Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

D.T.B., a minor child, by his next friend,
DANIEL J. O'CALLAGHAN, and
DANIEL J. O'CALLAGHAN, *Pro Se*, on his own behalf,

Petitioners,

v.

HON. JOHN J. FARMER, JR., in past or present official capacity as Attorney General of the State of New Jersey; HON. JOHN J. HARPER, in his past or present official capacity as Justice of the Superior Court of New Jersey, Chancery Division, Family Part; ANN T. SCUCCI; MATHIAS R. HAGOVSKY; and DAVID F. SALVAGGIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITON FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Does not the State's segregation of a child of unmarried parents and the father of such child for treatment different and unequal to child(ren) of married parents and such parent(s) violate the Equal Protection Clause. Has not the State failed the *heightened scrutiny* standard?

2. Has not the State failed to observe this Court's precedents which identify an unmarried father's 42 U.S.C. §§ 1983 and 1985(3) due process/ equal protection rights concerning association (*parentage and visitation*) with his child and the child's Constitutional protections?

3. Does not the State's use of illegal and unexamined evidence from a fake psychologist – statutorily prohibited concerning a child of married parents and such parents -- to position a severance/ termination of association (*visitation*) for 4 years between a previously always-involved loving father and his only child violate due process and equal protection?

4. Is not a *Rooker-Feldman* defense invalid as there has not occurred any "*final decision*" nor any decision on the merits at any time or by any court, nor has the State's highest court (or any State court) issued a final decision – or any decision -- which is "*inextricably intertwined*" with the Federal constitutional issues presented to the district court?

5. Does not the State's "*10 a.m. – 6 p.m.*" New York City – mid-New Jersey twice monthly Saturday or Sunday "*visitation*" for 2 years upon counsel's "*They're not married, they're not married*" and a concocted "dust on the floor" contention from a fake and partial psychologist violate due process and equal protection?

6. Does not the State's contention for *Rooker-Feldman* conflict with this Court's *certiorari* review standard as identified in *Florida v. Thomas*, 532 U.S. 774 (2001)?

7. Does not immunity fail for a person who claims this special treatment but who fails in all performance?

Table of Contents

Page

Questions Presented for Review i

Table of Contents ii

Table of Authorities iv

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

STATUTORY AND RULE PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 14

A. No *Rooker-Feldman* Bar:

Separate But Not Equal 14

B. Complaint Adequately Alleges

Civil Rights Violations 20

C. No Performance: No Immunity 25

CONCLUSION 29

APPENDICES

A - Opinion, District Court, Aug. 9, 2001 .....1a

B - Order, District Court, Aug. 9, 2001.....15a

C - Amend. Order, District Court, Dec. 17,2001.....17a

D – Order, District Court, Sept. 26, 2003 .....19a

E – Opinion, Court of Appeals, Sept. 14, 2004.....21a

F - Judgment, Court of Appeals, Sept. 26, 2004.....24a

G – Decision, *en banc* rehearing, Oct. 20, 2004 .....26a

H – FRCP Rules 12 (b) and 56.....28a

I – Parentage Act

Family Therapist Privilege.....29a

J – Family Court Rules.....30a

K – Family Court Complaint, June 22, 2000.....36a

Table of Authorities

Page

Cases

Alexander v. Whitman, 114 F. 3d 1392
(3rd Cir. 1997), *cert. denied* 118 S.Ct. 367,
139 L.Ed.2d 286 (19) 20

American Anti-Discrimination Committee v.
Reno, 70 F. 3d 1045 (9th Cir. 1995),
cert. granted in part, 118 S.Ct. 2059 (19) 20

Ankenbrandt v. Richards, 504 U.S. 689,
112 S.Ct. 2206, 119 L.Ed.2d 468 (1992) 20

Bray v. Alexandria Women's Health Clinic,
506 U.S. 263, 113 S.Ct. 753 (1993) 22

Caban v. Muhammed, 441 U.S. 380, -- S.Ct. -- (1979) 17

Callahan v. City of Philadelphia,
207 F.3d 668 (3d Cir. 2000) 25

Canal Capital Corp. v. Valley Pride Pack, Inc.,
169 F.3d 508 (8th Cir. 1999) 19

Carchman v. Korman Corp., 594 F.2d 354
(3rd Cir.), *cert. denied*, 444 U.S. 898,
100 S.Ct. 205, 62 L.Ed.2d 133 (1979) 25

Catz v. Chalker, 142 F.3d 279 (6th Cir. 1998) 19, 20

Christiansen v. Christiansen, 46 N.J. Super. 101,
134 A.2d 14 (N.J. Super. A.D. 1957) 17

Clark v. Jeter, 486 U.S. 456, 100 L.Ed.2d 465 (1988) 17

Cleburne v. Cleburne Living Center, Inc.,

473 U.S. 432 (1985)..... 22

Clements v. Airport Authority of Washoe County, 69 F. 3d 321 (9th Cir. 1995)..... 20

Coletta v. City of North Bay Village, 962 F.Supp. 1486 (S.D. Fla. 1997)..... 29

Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993)..... 20

Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49 (1st Cir. 1990)..... 23

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975)..... 17

Crawford-El v. Britton, 523 U.S. 574, 118 S.Ct. 1584 (1998)..... 23

E.B. v. Verniero, 119 F.3d 1077 (3rd Cir. 1997) 18

Ernst v. Child & Youth Servs., 108 F.3d 486 (3d Cir. 1997) 18

Exxon Corp. v. Heinze, 32 F. 3d 1399 (9th Cir. 1994) 20

Florida v. Thomas, 532 U.S. 774, 150 L.Ed.2nd 1 (2001)..... 17, 18

FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834 (3rd Cir. 1996)..... 18

Franklin v. Terr, 201 F.3d1098 (9th Cir. 2000)..... 21

Futernick v. Sumpter Tp., 78 F. 3d 1051
(6th Cir. 1996) 20
Gardner v. Parson, 874 F.2nd 131
(3rd Cir. 1989) 25, 28
Gottlieb v. County of Orange,
84 F 3rd 511 (2nd Cir. 1996) 17
Gubernat v. Deremer, 140 N.J. 120 (1995) 15
Gulla v. North Strabane Township,
146 F.3d 168 (3rd Cir. 1998) 18
Haring v. Prosise, 462 U.S. 306,
103 S.Ct. 2368 (1983) 14
Hughes v. Long, 242 F.3d 121
(3d Cir. 2001) ("*Hughes* II") 25
Hughes v. MacElree, 168 F.3d 478
(3d Cir. 1998) ("*Hughes I*") 28
In re Baby M, 109 N.J. 396 (1988) 15
Jefferson v. City of Tarrant, 522 U.S. 75,
118 S.Ct. 481, 139 L.Ed.2d 433 (1997) 18
Kinsella v. Kinsella, 150 N.J. 276,
696 A.2d 556 (1997) 21
Lewis v. East Feliciana Parish Sch. Bd.,
820 F.2d 143 (5th Cir. 1987) 19
Lugar v. Edmondson, 457 U.S. 922,
102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) 21
Lyes v. City of Riviera Beach, 166 F.3rd 1332
(11th Cir. 1999) 22

Marks v. Stinson, 19 F.3d 873 (3rd Cir. 1994)..... 19
Matthews v. Lucas, 427 U.S. 495, -- S.Ct. -- (1976)..... 22
McKinnon v. Kwong Wah Restaurant,
83. F.3d 498 (1st Cir. 1996)..... 28
Miller v. Christopher, 96 F 3rd 1467
(D.C. Cir. 1996)..... 17
Miller v. City of Philadelphia,
174 F 3rd 368 (3rd Cir. 1999)..... 16
Mills v. Habluetzel, 456 U.S. 91, -- S.Ct. – (1982)..... 22
Mills v. Habluetzel, 456 U.S. 91,
71 L.Ed.2d 770 (1982)..... 17
Minnick v. California Dept. of Corrections,
452 U.S. 105, 101 S.Ct. 2211, 68 L.Ed.2d 706 (1981)... 18
Mitchell v. Forsyth, 472 U.S. 511,
105 S.Ct. 2806 (1985)..... 28
MSA Realty Corp. v. State of Ill., 990 F.2d 288
(7th Cir. 1993) 25
Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987)..... 28
Novotny v. Great Am. Fed. Sav. & Loan Assoc.,
584 F.2d 1235 (3rd Cir. 1978),
vacated on other grounds, 442 U.S. 366,
99 S.Ct. 2345 (1979)..... 22
Pearson v. Miller, 988 F.Supp. 848
(M.D. Pa., 1997) 25
Pena v. Mattox, 95-2053 (7th Cir.1995)..... 21
Petrocelli v. Daniel Woodhead Co.,

993 F.2d 27 (3d Cir. 1993) 28

Pierce v. Smith, 117 F.3d 986 (5th Cir. 1997) 28

Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3rd 808 (6th Cir. 2002) (*en banc*), *cert. denied*, __ U.S. __, 123 S.Ct. 72 (2002) 16

Resolute Insurance Co. v. State of North Carolina, 397 F.2d 586 (4th Cir. 1968). 19

Robinson v. Ariyoshi, 441 F.Supp. 559 (D. Haw. 1977), *aff'd in part, vac'd in part*, 753 F.2nd 1468 (9th Cir. 1985), *vac'd on other grounds* 477 U.S. 902, 106 S.Ct. 3269 (1986), *on remand* 887 F.2nd 215 (9th Cir. 1989) 18

Robinson v. Ariyoshi, 753 F.2nd 1468, 1472 (9th Cir. 1985) 14

Rubinovitz v. Rogato, 60 F. 3d 906 (1st Cir. 1995) 20

San Antonio School Disctrict v. Rodriguez, 411 U.S.1, 36 L.Ed.2d 16 (1977) 17

Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982) 17

Santowsky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982) 21

Scalza v. Shop Rite Supermarkets, Inc., 304 N.J. 636, 701 A.2d 764 (N.J. Super. A.D. 1997) 17

Skinner v. City of Miami, 62 F.3d 344 (11th Cir. 1995) 23

Sloan v. Delo, 54 F. 3d 1371 (8th Cir. 1995),

cert. denied 516 U.S. 1056,116 S.Ct. 728 20

Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990) 25, 26

Spencer v. Steinman, 968 F.Supp. 1011
(E.D. Pa. 1997) 21

Stanley v. Illinois, 405 U.S. 645,
92 S.Ct. 1208 (1972) 21, 22

Storck v. Suffolk County Dept. of Social Services,
62 F.Supp.2d 927, at 940-41 (E.D.N.Y. 1999) 21

Sun Valley Foods Co. v. Detroit Marine
Terminals, Inc., 801 F.2d 186 (6th Cir. 1986). 19

Troxel v. Granville, 530 U.S. 57,
120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) 16

Valenti v. Mitchell, 962 F.2d 288 (3d Cir. 1992) 19

Vitek v. Jones, 445 U.S. 480 (1980) 16

Ward v. Village of Monroeville, 409 U.S 57,
93 S.Ct. 80 (1972) 20, 21

Weber v. Aetna Casualty & Surety Co.,
406 U.S. 164, 31 L.Ed.2d 768 (1972) 17

Whiteford v. Reed, 155 F.3d 671 (3d Cir. 1998),
cert. denied, -- U.S. --, 120 S.Ct. 2231 (2000) 18

Constitutional Provisions

Eleventh Amendment 25

Equal Protection Clause 24

Statutes

28 U.S.C. § 1254 (1) 2

28 U.S.C. § 1291 (b) 2

28 U.S.C. § 1331 2

42 U.S.C. § 1983 ..... 2, 14, 19, 20, 21, 23

42 U.S.C. § 1985 (3) 2, 19, 21, 22, 23

Rules

Federal Rules of Civil Procedure ("FRCP") Rule 56 2

Federal Rules of Civil Procedure ("FRCP") Rules 12 (b) 2

New Jersey Statutes and Rules

Marriage and Family Therapist Privilege,
Rule of Evidence, R. 510 (the
"Family Therapist Privilege") 3, 6, 7, 8, 20, 21, 27

N.J. Family Court Rules 2

N.J. Family Court Rules, R. 5 7

N.J. Family Court Rules, R. 5:1-4, *et seq.* 19

N.J. Family Court Rules, R. 5:8B 10

Other Authorities

"*Parenting Time: A Child's Right*", *N.J. Court Internet site at* ___ 23

"*State Court Judgments – Finality*", 29 L.Ed.2d 872 18

New York Times, April 16, 2002 13

Nightline, April 16, 2002 13

The Star Ledger, October 5, 2003, "…[Divorce]: a Multimillion Dollar Industry" 13

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HON. JOHN J. FARMER, *et al.*

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The opinion of the United States District Court for the District of New Jersey is not officially reported, is dated August 9, 2001, and appears in Appendix ("**App**") A at 1a. The order of the District Court which granted Defendants' Attorney General John J. Farmer, Jr.'s and the Hon. John J. Harper's motion to dismiss is not officially reported, is dated August 9, 2001, and appears in App B at 15a. The amended order of the District Court which addressed the amended complaint is not officially reported, is dated December 17, 2001, and appears in App C at 17a. The order of the District Court which granted summary judgment in favor of Defendant Mathias R. Hagovsky is not officially reported, is dated September 26, 2003, and appears in App D at 19a.

The opinion and judgment of the Court of Appeals for the Third Circuit which affirmed are not officially reported, are dated September 14, 2004, and appear in App E and F at

21a-24a. The decision upon sur petition for rehearing of the Court of Appeals for the Third Circuit which denied the petition for rehearing en banc is not officially reported, is dated October 20, 2004, and appears at App G at 26a.

JURISDICTION

The order of the District Court which dismissed the complaint against Attorney General John J. Farmer and Hon. John J. Harper was entered on August 10, 2001. The amended order to the same effect was entered on December 19, 2001. The order of the District Court which denied 28 U.S.C. § 1291 (b) relief to this Court was entered on November 20, 2001. The order of the District Court which granted summary judgment in favor of Defendant Mathias R. Hagovsky was entered on September 30, 2003.

Subject matter jurisdiction in the District Court was grounded upon 28 U.S.C. § 1331. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY AND RULE PROVISIONS

As outlined in the Appendices, these provisions are involved: 42 U.S.C. § 1983 and 1985 (3) and Federal Rules of Civil Procedure ("FRCP") Rules 12 (b) and 56 and the New Jersey Parentage Act, New Jersey Family Therapist Privilege, and New Jersey Family Court Rules

STATEMENT OF THE CASE

This case arises out of a N.J. family court case conducted since June, 2000, before the Hon. John J. Harper ("**Judge Harper**") and since November, 2001, before the Hon. David B. Rand ("**Judge Rand**"). This case relates to the Parentage Act and children of unmarried parents.[1]

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[1] N.J. Parentage Act, establishes a "parent and child relationship" "... includes...father and child relationship" and "extends equally to every

Subsequent to the father's filing in June, 2000, of a N.J. family court clerk-prepared complaint for ***paternity and visitation*** relating to D.T.B., Judge Harper accomplished an absence of all visitation ("association").[2] Instead, virtually immediately, on August 24, 2000, Judge Harper used a defendant-mother's counsel's submission of a false letter from Jeannette Lofas ("**Lofas**"), a fake "Ph.D." or "Dr." with "associates" in N.J. ("**Stepfamily.com**") to extinguish a then 56-year old father's relationship with his then 8-year-old son and only child. This was accomplished solely in consequence of counsel's, David F. Salvaggio's ("**Salvaggio**"'s) submission of the Lofas letter dated August 24, 2000:[3]

> *... I am a psychologist and have seen ... [the mother, child and father] .... I do not believe that it is in ... [DTB]'s best interest to be forced to sleep overnight at his father's house at this time. .... It seems that ... [DTB] and his father have a good relationship. .... signed, [Lofas], Ph.D.*

Lofas's contentions relate solely to the one (1) night use of an upstairs bedroom for the child. Notwithstanding false and unexamined, these contentions were accepted upon

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child and to every parent, regardless of the marital status of the parents"; Closed court.... *App I at 29a.*

[2] Complaint dated June 22, 2000. *App K at 36a.* For six (6) months before and two (2) years after child's June 19, 1992, N.Y.C. birth, the parents resided together. Subsequent to nearly eight (8) years of uninterrupted/ substantial continuity of relationship between father and child, in early May, 2000, absent all cause or justification, the mother prevented all relationship between father and child. In consequence, the father filed said complaint for paternity and visitation.

[3] Lofas repeatedly misrepresented "*Ph.D*", "*Dr.*", and "*I am a psychologist*". Salvaggio presented Lofas's "resume" also which included a fake "Ph.D" credential and website "...44,000 hits/ month". Submissions were in violation of NJ's "*Family Therapist Privilege*". *App I at 29a.* Nonetheless, immediately – and for nearly 4 years -- Judge Harper and the N.J. Appellate Division have used this letter to sever/ terminate all parent/ child relationship between DTB and his previously always-involved father.

Salvaggio's insistence for Lofas's determinative role and solely grounded upon Lofas's "Ph.D." and "Dr." credentials – soon revealed as fake. Days earlier, the Hon. Christine Miniman, a family court judge, had criticized Judge Harper's and Salvaggio's contended authorization for the mother's immediate entrance into the father's N.Y.C. home so as to "*interview the plaintiff-father's wife*" upon a "phase-in":

> "*The child is not 18 months old. This is a 7 year old boy who's had a ... relationship with his dad for an extended period of time. .... I don't get the concept of easing him in to overnights, frankly.*"[4]

Nonetheless, upon Lofas's letter, Judge Harper imposed in a summary support order "*no overnights*" and designated local "favorites" including a former law clerk Ann T. Scucci ("**Scucci**") and a local "psychologist", Mathias R. Hagovsky ("**Hagovsky**"), to review the case, "see" the child and report "within 14 days":

Salvaggio	*[testifies] ... Lofas is a psychologist. ... I happen to know your Honor...that he [Dr. Hagovsky] is around...*
Judge Harper	*.... I agree with the psychologist [Lofas] that we work toward and phase-in ...[reads Lofas letter] to an overnight. I'm going to appoint ... Scucci ...["High 5" gesture by Salvaggio]. ... Yeah, we're*

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[4] Upon service of the complaint for paternity and visitation, Salvaggio -- *ex parte*, through family court personnel -- facilitated an absence of all association between father and child (except 1 afternoon) to/ until Judge Miniman's "phase-in" critique in mid-August, 2000. Immediately, upon this first overnight as directed by Judge Miniman (and the first overnight in 4 months), Salvaggio procured Lofas's immediate involvement and letter and presentation to Judge Harper.

Several months later, Judge Miniman was transferred from the Morris county family court to a different county.

not talking overnights until I can get someone to see the child.....[W]e'll call immediately... [N]eed ... Dr. Hagovsky's help ... to get on it immediately. ...I'm going to get ... Dr. Hagovsky We'll get him appointed and notified immediately.... [W]e can get a telephonic report...So we don't have to wait for a written report -- ... something going here right away... I'd like to get the telephonic report within 14 days. I want this. ....

Upon the father's August 28, 2004, prompt revelation that Lofas secretly had traumatized the child ("*DTB's Discussion*") --again absent all hearing or other fair process -- immediately, Judge Harper secretly retracted the days-earlier "order" for these favorites to perform. Thus, in violation of the August 24, 2000, order, interviews of the mother and child -- scheduled immediately by Salvaggio with Hagovsky for September 7-9, 2000 -- secretly were canceled by Salvaggio.

This occurred with Hagovsky's knowledge and consent, indeed, promptly upon Salvaggio's receipt of *DTB's Discussion* which documented Lofas's culpability. On September 8, 2000, secretly, Judge Harper directed that Scucci attend, prejudicially excused Scucci's absence of performance, failed to direct any future performance, then – absent "track system" process, instead, another summary support order -- directed the 2 designated appointments "to continue":

Salvaggio *... I, have no relationship at all with ... [Scucci]...I have never been affiliated with her in any way. I don't have personal relationship with her....[whispering by law clerk: "... [Scucci]'s on her way ... on her way ...] ... I think had said let's have telephone conference with ... [Hagovsky] ... I called him yesterday afternoon to make*

sure that he knew that we would need to, you know, put it off ...

Scucci *Your Honor... I have not received a copy of the ... [appointment order].*

Harper,J. *That's right ... Other than the fact that the order was signed, there has been no work to my knowledge that was required ... No, I didn't direct you at this point to take any action.*

Scucci *OK.*

Harper,J. *The Order was signed and that's as far as it's gone.*

Scucci *I'm going to give each of the parties my business card so that they have a way to contact me so that if your Honor does decide that you do wish me to become involved in this case ...*

Harper,J. *OK. Fine. ... [Scucci exits courtroom.]*

In consequence, during the period of the child's observed distress, *i.e.*, August 28, 2000 - September 8, 2000, Judge Harper assured that the designated GAL and psychologist – lauded just days earlier - did not intervene.

Thereafter, for months – then years -- Judge Harper failed to enforce his own summary support orders for mere Saturday or Sunday 10 a.m. – 6 p.m. calamitous (round trip) inter-state "association" between DTB's Chester, N.J., residence and his father's Brooklyn, N.Y. home. Thereafter, absent any confidentiality protection for this then 8-year-old child (now 12 ½) as mandated by the Parentage Act, Judge Harper retained the case in chambers for at least 10 months. This violated Family Therapist Privilege and case "track

system".[5] This case addresses conflicts between Scucci, Salvaggio and their many-months secret "of counsel" arrangement through a third Morristown attorney, Michelle Hart ("**Hart**").

On December 6, 2000, subsequent to 4 months of inaction by Scucci and Hagovsky – and the day after the N.J. Appellate Division's "No" to any prompt interlocutory appeal grounded upon Judge Harper's misuse of Lofas – Scucci sent a secret, unsigned letter to Judge Harper and to Salvaggio (also telephoned) contending performance.

On December 8, 2000 -- 4 months after the designations -- the next open court proceeding was held, *i.e.*, just (i) 1 day after Scucci's false "*He didn't call me back*" excuse letter, and (ii) 3 days after the N.J. Appellate Division's summary denial of any interlocutory appeal upon use of the Lofas letter in violation of the *Family Therapist Privilege*. At this proceeding, for the first time it was revealed that Hagovsky had not performed for 4 months. In the interim, the child was restricted to "10 a.m. to 6 p.m." inter-State association with his father for a few hours on a few days.

Upon the December 8, 2000, production of Scucci's letter, there were revealed on the letterhead conflicts with Salvaggio, *e.g.*, both these single practitioners' offices included Hart as "of counsel". Scucci had not accepted the GAL designated assignment, had not performed for 4 months,[6]

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[5] *See App J at 30a – 31a, e.g.*, "track systems" for a child (or children) of married parents – none for this child. Earlier, in July, 2000, Judge Harper ordered probation to conduct a "best interests" investigation. Upon Lofas's letter, Judge Harper replaced probation with a compliant former law clerk, Scucci: "*I will do whatever your Honor wants me to do*". Judge Harper failed to forward the "best interests" order to probation or place the case on any "track". Thus, no investigation conducted by anyone, *i.e.*, until 2 years later by Lee Monday, Ph.D.

[6] Purportedly, Scucci briefly interviewed the child on October 8, 2000. Thereafter, Scucci did nothing for 2 months notwithstanding an August 30, 2000, order: " … *shall interview the parties and the child*".

had not provided statutory "notice"/ monthly statements for services and had never communicated with the father. Nonetheless, Scucci fabricated an excuse: "...*[He] didn't call me back*". Throughout, August 25–December 8, 2000, absent any "stay", neither the mother nor Salvaggio re-scheduled appointments with Hagovsky or with Scucci -- and neither Hagovsky nor Scucci intervened. Thus, a timely examination of the child during the period of distress caused by Lofas was avoided.[7]

The father's requests for Scucci's telephone records/ cross-examination were denied by Judge Harper in an injudicious December 8, 2000, proceeding which included slurs against the father's deceased parents and (unsuccessful) efforts to have the father engage in a criminal offense in the courtroom.[8] Scucci never resumed the (purported) October 8, 2000, child interview, never interviewed the mother or anyone else, never obtained records of school/ neighbors, friends or

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[7] Scucci was designated upon R.5:8B which provides: **(a) Appointment.** ...[a] [GAL]...may be appointed... if...circumstances warrant ..... **(b) Objection ....** A proposed ...[GAL] shall have the right to consent or to decline ..., notice of such ... to be in writing ...The parties shall have the right to object ... *App J at 33a – 34a.*

Judge Harper and Scucci were engaged in joint action to conceal Scucci's non-performance while Judge Harper awaited (eventual, *i.e.,* December 4, 2000) N.J. Appellate Division (interlocutory) summary approval for violation/ avoidance of Family Therapist Privilege concerning a child of unmarried parents. Scucci's failure to provide Rule 5:8B written notice/ monthly statements facilitated this plan.

[8] Commonly, Judge Harper has handcuffed and shackled prisoners – typically, minority men – sitting in the jury box "bleachers" to observe the routine in proceedings concerning unmarried fathers. Upon Salvaggio's demand, Judge Harper ordered that the father accept transfer of title to a vehicle in the mother's name and valued at nearly $5,000 for "$1". The N.J. title document (reverse side) identifies as a misdemeanor/ jail sentence/ fine to a recipient of a title transfer for less than "*fair market value*". This exists in order to prevent the registered seller from failure to pay sales tax at actual value.

conducted any "*investigation*", *and never provided* (or was required to provide) explanation for such disinterest/non-performance.[9]

In mid-December, 2000, Judge Harper, Salvaggio, Scucci, and Hagovsky, together, pursued immediate interviews and reports under threat for sanctions, dismissal of the complaint and extinguishment of all "visitation" – *de facto* which already had been accomplished. Meanwhile, inhumane 10 a.m. – 6 p.m. interstate bi-weekly Saturday/ or Sunday "association" continued during these 4 months – and as events developed through N.J. appellate court disinterest -- for an additional 2 years. On December 29, 2000, for the first time, Salvaggio wrote to Hagovsky enclosing copies of orders upon which Salvaggio provided "excuse" to Hagovsky for the many-month injurious absence of any Hagovsky performance:

> *[T]his week, you requested that I fax you the Orders ... your appointment [August 25, 2000]... "see the child" and "report...within 14 days". However, the process did not go forward, because...[father]... application...[for]...[stay]...*

Contemporaneously, the father filed a grievance with the Advisory Committee on Judicial Conduct ("**ACJC**"). Judge Harper assured that at no time or in any manner would/ could Scucci (or anyone) be made subject to sworn testimony, production of telephone records/ other information or appearance in open court.

In January, 2001, upon receipt of information that the father had filed a complaint with the ACJC and that the N.J. Supreme Court summarily had denied a motion for interlocutory appeal, Judge Harper planned "dismissal" of the complaint for paternity and visitation -- but not on the

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[9] Scucci's letter – not signed -- sought a boarding future for the child, then 8, at a NYC 24/7 school approached through the 1992 N.Y. birth certificate upon which the mother had concealed the father's identity, thus contending "sole custody".

merits.[10] On February 2, 2001, the father sought disqualification of Scucci, Salvaggio, and Hagovsky upon conflicts/ improprieties and non-performance for 4 months.

Notwithstanding that the father's late-December, 2000, "reconsideration submissions" (and February 2, 2001, disqualification motion) presented for the first time (i) conflicts of interest, (ii) objection to Salvaggio's direction to Hagovsky not to perform and failure to perform for at least 4 months, (iii) objection to Scucci's failure to satisfy R.5:8B notice/ statements, fabricated "*No call back*" excuse and request for telephone records, sworn testimony and court appearance, and (iv) observed increasing distress of the child, Judge Harper avoided accountability for himself and his local friends by dismissing complaint for paternity and visitation *without prejudice* in a February 6, 2001,"Letter Decision"/ order which also "relieved of duties" (except as "volunteers") the culpable regulars, Scucci and Hagovsky (also, implicitly, Salvaggio). In March, 2001, Judge Harper rewarded Salvaggio with a $10,000 order for attorneys' fees.[11]

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[10] In July, 2000, a prior Morris county family court judge had entered an order which established paternity in Petitioner-father.

[11] New Jersey does not use/ maintain any public list or "roster" of GAL candidates/ psychologists/ other experts in the family court system nor limitation upon earnings or number of case assignments. Instead, local "favorites" are selected by family court judges for enrichment in a system which remains absent actual accountability or objective standards.

During the lengthy period, *August, 2000 – April, 2002*, the mother failed on at least 28 Saturdays/ Sundays to provide even the 6-8 hour no-overnight (twice) per month inter-state "association" authorized.

From the September 11, 2001 attack on our nation at the World Trade Center through April, 2002, there occurred an absence of all "association": Judge Harper had authorized solely (dangerous) "exchanges" at the father's Dey Street, NYC, office located ½ block from the disaster site, or at Penn Station (NYC).

Upon the attack, the mother refused any "association" except "exchanges" at these 2 locations. Notwithstanding early October, 2001, "appeal",

Lofas did not appear upon subpoena/ other process; did not take the stand under oath; did not respond to questions on direct/ cross. Judge Harper repeatedly denied any/ all open court proceeding, then, placed the Lofas and Scucci letters "into evidence" absent any examination or appearance by anyone. Lofas was a fake "psychologist" who in violation of N.J. (and N.Y.) licensing requirements, submitted an unexamined/ false letter which became the pretext for the now more than 4-year severance/ termination. The letter submission was absent all testimony/ cross-examination, absent all court appearance/ trial, and was submitted (through Salvaggio) absent any court order/ involvement.

Dismissal was not "on the merits", rather, "sanction" for "reconsideration submissions" -- such grounded upon receipt of long-delayed court recordings which revealed the misconduct of Judge Harper concerning Scucci and Lofas and the absence of enforcement (or "Stay") of the August 25, 2000, order for *Hagovsky to "see" the child and "report within 14 days"*. Instead, Judge Harper positioned a cumbersome, expensive and as events developed, nearly 2-year preordained useless appeal to the N.J. Appellate Division while inter-State bi-weekly 10-6 "association" traumatized an 8-9-year old child.[12] Solely in order to promote prejudice --

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nearly 60 days later, *i.e.*, on November 29, 2001 (earlier, Judge Rand on November 7, 2001), the N.J. Appellate Division summarily validated these bizarre and dangerous "exchanges". In consequence, no association occurred between a nearly 60-year old father and only child for 6 months during this national tragedy – including public commemorations for 2 of the plaintiff-father's N.Y.C. firefighter cousins who remain entombed at the WTC disaster site.

[12] Inexcusably, for 20 months (DTB's entire 8th-9th years), the Letter Decision dismissal of complaint for paternity and visitation as a "sanction" languished in the N.J. Appellate Division absent decision. On the other hand, there occurred prompt validation of Judge Harper's authorization for bizarre and frightening visitation "exchanges" solely at the World Trade Center disaster site (or Penn Station (NYC)) for more than six (6) months.

In the past 4½ years, on behalf of DTB, the plaintiff-father has pursued numerous, comprehensive and expensive "interlocutory" "emergency" and

particularly relating to proceedings against Lofas pending in New York -- in the Letter Decision, Judge Harper revealed the existence of a December, 2000, statement of grievances (then) under consideration before the ACJC. Immediately upon notice that a Federal civil rights case had been filed, the ACJC abandoned a six (6)-month filed grievance absent all explanation or remedy.

Thus, absent all fair process -- or any examined evidence -- in February/ March, 2001, Judge Harper used false and unexamined Lofas and Scucci letters to dismiss *without prejudice* a father's complaint for paternity and visitation. Instead, Judge Harper (then the N.J. Appellate Division) maintained inhumane inter-State few-hour (10-6 Saturday or Sunday) "visitation" for nearly 2 years.[13]

Thereafter, *i.e.*, subsequent to 2 years of "severance/ termination", in/ about June, 2002, so as to promote any association, the plaintiff-father moved to Northeastern Pennsylvania – a predictable commute to DTB's Chester, NJ, residence. Secretly, however, late-2001 -- mid-2002, *i.e.*, during the 6-month period of the child's World Trade Center

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other "appeals" through N.J.'s Appellate Division in addition to motions to "expedite" and other requests relating to the child's obvious, unnecessary and worsening distress. Invariably, all relief has been denied summarily upon one line "No"'s. Invariably, this occurred after many months of disinterest and inaction.

[13] The "phase-in" could be accomplished (i) only via Staten Island Expressway, I-95, I-78 [or, Brooklyn-Queens Expressway, Manhattan streets, GW Bridge, I-80], N.J. 206, then rural Chester, NJ roads – at best 90 minutes each way upon unpredictably congested roads -- by a then 8-10 year old child – (ii) in order 2 times monthly to have "association" for less than 6-8 hours with a previously always-involved father and (iii) as imposed for nearly 2 years, severed and terminated the Federal right to parent-child relationship. This was imposed upon child and father solely grounded upon Salvaggio's August 25, 2000, submission of Lofas' letter – *i.e.*, absent all discovery, hearing, trial or other evidence – excepting Scucci's "*Did not call me back*" December 8, 2000, concocted and unexamined excuse.

isolation, the mother enrolled DTB into another 24/ 7 boarding school, *viz.*, **American Boychoir** located in Princeton, NJ. In mid-June, 2002, unsolicited, Judge Rand advocated – then, authorized – the mother's "relocation" so as to accomplish enrollment. In consequence of "relocation" and the already adverse effects of 2 years of severance/ termination, the child had been traumatized and exhibited signs of great distress and alienation. In mid-August, 2002, Judge Rand designated Lee Monday, Ph.D. ("Dr. Monday") – a well-credentialed NJ psychologist – to provide an evaluation. Dr. Monday conducted lengthy interviews of the parents and child, and on August 30, 2002, advised: not to approve enrollment, significant expansion of the father's association/ guidance in the child's life and urgent requirement for the child's "*immediate therapeutic counseling*".

Concurrently, the mother's new counsel, Einhorn, Harris, *et al.* ("**Einhorn**"), a politically influential firm, sought to establish "relocation" through Princeton area cohabitation with a male stranger landlord. Judge Rand withdrew authorization for enrollment. Einhorn sought emergent relief in the Appellate Division to compel DTB's enrollment in this troubled school.[14] Notwithstanding that Dr. Monday's report was known to be imminent, the Appellate Division did not wait for it. Instead, within 48 hours (on *September 11, 2002*), again, summarily, reinstated authorization for the child's enrollment in American Boychoir. The child was enrolled and remains.[15]

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[14] *See New York Times* and *Nightline*, both April 16, 2002 re: long-term effects of sexual abuse to boys who had attended American Boychoir.

See also, *The Star Ledger*, October 5, 2003, "…[Divorce]: a Multimillion Dollar Industry". In New Jersey, "a … cast of professionals … besides the lawyers – forensic accountants, psychologists, real estate appraisers and certified divorce planners … and you have a multimillion dollar industry."

[15] Such "relocation" results in at least a 90 miles one-way commute between child and father, *i.e.*, encompasses at least five (5) hours of

Thus, through unequal treatment/ violation of due process, Judge Harper (later, Judge Rand and throughout the N.J. Appellate Division) injured a child of unmarried parents and the child's previously always-involved father. This has resulted in a more than 4-year wrongful severance/ termination of parent-child relationship.[16]

REASONS FOR GRANTING THE WRIT

A. No *Rooker--Feldman* Bar: Separate But Not Equal.

In *Rooker*, this Court held that a district court may not review the final decisions of a State's highest court of competent jurisdiction; such review may be obtained only in the Supreme Court. In *Feldman*, the Supreme Court authorized "*general constitutional challenges*" to State statutes/ rules/ practices.[17]

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dangerous round trip commutation through central N.J. This accomplishes a prohibitive, unexamined "move-away" and continues the already more-than 30-month severance/ termination.

[16] Notwithstanding that the N.J. courts have imposed inhumane 10 a.m.-6 p.m. few-hour "association" for nearly 3 years grounded solely upon misuse of a letter from a bogus "Ph.D", the State of Connecticut exposed this fake in a lengthy "***CEASE AND DESIST ORDER***" dated March 6, 2003. Nonetheless, the N.J. Appellate Division has declined to include this public order into any record for any appeal.

[17] *See generally, Robinson v. Ariyoshi*, 753 F.2nd 1468. 1472-73 (9th Cir. 1985): "*Rooker*...the Supreme Court...final arbiter, were ...[constitutional questions] 'actually *arose in the cause*' in which a *full hearing* was held and where the *judgment was responsive to the issues*...[citation omitted]. ....*Feldman*,...held that where allegations underlying a state's highest court's final judicial decision are '*inextricably intertwined*' with issues presented to a federal court, the federal court has no jurisdiction over those issues, even if those challenges included constitutional claims. ...[460 U.S. 462,. at 486, 103 S.Ct. 1303, at 1316-17].

[*Robinson* relied upon *Haring v. Prosise*, 103 S.Ct. 2368, 2373 (1983), a § 1983 action in which the Supreme Court had concluded]: "[C]ollateral estoppel...will not be given to a state court conclusion where the complaining party did not have full and fair opportunity to litigate a claim

The father's complaint presented claims for "***paternity and visitation***". The Letter Decision/ order dismissal was not on the merits, was not a final judgment (or "decision"). Thereafter, interlocutory motions for leave to appeal did not establish "finality", nor did the father's "full appeal" to the Appellate Division -- which specifically identified that such appeal was "not on the merits": the dismissal as a "sanction for reconsideration submissions" was not final under State or Federal law. The Federal complaint specifically alleges "*general constitutional challenges*" which were neither considered nor determined by any State court, more, were not "*inextricably intertwined*" with any State court final decision on the merits – which never has occurred.

In *Gubernat v. Deremer*, 140 N.J. 120 (1995), N.J.'s Supreme Court addressed the Parentage Act:

> *... [T]he Legislature stated: "... Act is intended to establish... regardless of ...marital status..., all children and parents have equal rights with respect to each other ...." .... "...claims of the natural father and the natural mother are entitled to equal weight,..." ... The Act also eliminated legal differences between children born in a marriage and children born out of wedlock, following a line of United States Supreme Court decisions "mandating equality of treatment between legitimate and illegitimate children."*
>
> .....
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> *...Legislature...has ended gender-based differences in...parental rights, ...instead determined that...disputes about children... resolved...in...child's best interests. Sex-based presumptions, such as.."tender years"... replaced by...inquiry focused on... happiness and welfare*

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in state court or where the state court demonstrated inability or unwillingness to protect federal rights... We are asked to review district court findings about constitutional claims which themselves were never decided by a state court, intertwined or otherwise. ...'

of...child.....Courts are required to engage in meticulous fact-finding to determine...best interests... ....[cit. omitted].

Although the N.J. Legislature intended "best interests" to govern, the policy/ practices of the State judiciary are to the contrary. The State's "*non-dissolution*" category for child/ children of unmarried parents omits any "track system", instead, summary support orders. The child's "best interests" never were considered. For no legitimate reason, the State judiciary shattered this child's 8-year continuity of relationship with his previously always-involved now 61-year old father. The destruction for (more than) 4 years of this child's "happiness and welfare" never were considered.[18]

These facts/ circumstances should assure remedies for both father and 8-12½ year old child -- one at the center of injury but grievances not addressed in any forum. *See e.g., Troxel v. Granville*, 530 U.S. 57 (2000). *Rooker-Feldman* was not intended to provide a shield for misconduct. As stated in *Miller v. City of Philadelphia*, 174 F 3rd 368 (3rd Cir. 1999):

> "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'". .... [citations omitted] .... The Supreme Court has recognized a "fundamental liberty interest of natural parents in the care, custody, and management of their children." *Santosky v. Kramer*, 455

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[18] The State Defendants have failed to satisfy minimum due process. *See Vitek v. Jones*, 445 U.S. 480, 491 (1980) ("minimum due process ...[are] a matter of federal law,...not diminished...that...State may have specified its own procedures that it may deem adequate ..."); *see Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3rd 808 (6th Cir. 2002) (*en banc*):

> [P]laintiff's due process interest is significant in that the judicial proceeding will determine the amount of time, if any, he can spend with his ... [child]. ... The Supreme Court has recognized the special nature of parental rights and has ... imposed special due process guarantees so that states may not lightly terminate parents' relationships with their children."(emphasis added).

> U.S. 745, 753 .... We, and other courts of appeals, have recognized this as a protectable interest. [citations omitted] ...." (emphasis added).[19]

This Court in *Florida v. Thomas*, 532 U.S. 774 (2001), identified standards for *certiorari* review of a State "decision" – *i.e.*, jurisdiction unavailable to/ until "final decision by final court". On October 29, 2002, the N.J. Appellate Division conceded "*not final*": remanded father's "sanctions" appeal – after 3 years -- for consideration of "*overnights", if any.*

State Law: The dismissal was "*without prejudice*". Under N.J. precedent, there has not occurred any adjudication on the merits and there does not exist any bar to reinstitution of the claim in a subsequent action. *Scalza v. Shop-Rite Supermarkets, Inc.*, 304 N.J. 636, 701 A.2d 764 (N.J. Super. A.D. 1997); *Christiansen v. Christiansen*, 46 N.J. Super. 101, 134 A.2d 14 (N.J. Super. A.D. 1957) (dismissal without prejudice is "nonsuit", adjudicates nothing).

Federal Law: In *Thomas, supra*, this Court addressed "final judgment" for *certiorari* jurisdiction. This Court precluded jurisdiction citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). This Court ruled that a State judgment was not final for § 1257 (a) review because (i) not conclusive, *i.e.*, outcome of further proceedings not preordained, and (ii)

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[19] *See also, Miller v. Christopher*, 96 F 3rd 1467, 1475-76 (D.C. Cir. 1996) (Wald, J., concurring in judgment upon *Caban v. Muhammed*, 441 U.S. 380 [,-- S.Ct. --] (1979)): stereotypes of relationships mothers and fathers have with their illegitimate children acceptable, if at all, only in infancy.

See generally, Clark v. Jeter, 486 U.S. 456 (1988) (equal protection concerning child of unmarried parents); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (equal protection citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) ("important as ... a state interest might be, we have repeatedly held that 'imposing disabilities on the illegitimate child is contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility or wrongdoing'"; and *San Antonio School District v. Rodriguez*,, 411 U.S. 1, 28 (1977) ("suspect class" entitled to protections of strict scrutiny.)

remand could give rise to a Federal question that might come later to the Court. To be reviewable a State judgment must be final in 2 senses: it must (i) be subject to no further review/ correction in any other State tribunal, and (ii) be final as the effective determination of litigation, *i.e.*, not merely an interlocutory/ intermediate step – the judgment must be the "*final word of the final court*". *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997). *Accord Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981). *See generally*, "State Court Judgments – Finality", 29 L.Ed.2d 872; *Robinson v. Ariyoshi*, 753 F.2nd 1468, 1472-73 (9th Cir. 1985).

Respectfully, there does not exist "finality" to the (procedural/ "sanctions") Letter Decision/ order "appealed" to the N.J. Appellate Division. In consequence, the Supreme Court does not have jurisdiction pursuant to §1257 (a) to review any appeals which could be taken upon a petition for *certiorari* from the N.J. courts. Reliance upon *Rooker-Feldman* is invalid. As explained in *Thomas*, there has not occurred "Federal" (or State) "finality" to the February – March, 2001, Letter Decision/ order which were "on appeal". More, the Third Circuit narrowly construes *Rooker-Feldman*. *See Whiteford v. Reed*, 155 F.3d 671, 674 (3rd Cir. 1998) no bar to claim that had been rejected on procedural grounds by state court:

> ...[W]here a state action does not reach the merits of...claims, then *Rooker-Feldman* does not deprive the federal court of jurisdiction. *See* 22.*Gulla*, 146 F.3d at 172-73; *E.B. v. Verniero*, 119 F.3d 1077, 1091 (3rd Cir. 1997) (if state court had not decided merits of claim, *Rooker-Feldman* not bar).[20]

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[20] *See Gulla v. North Strabane Township*, 146 F.3d 168, 172-73 (3rd Cir. 1998) (no bar for lack of standing); *Ernst v. Child & Youth Servs.*, 108 F.3d 486, 491-92 (3d Cir. 1997) (no bar; Federal court "would not have required the court to find that the state court judgments ... were erroneous"); *FOCUS*, 75 F.3d, *supra*, at 841-42 (no bar; same); *Marks v.*

The remedies sought against the State Defendants, *i.e.*, declaratory judgment (or injunction), should have been granted which determined, as alleged:

- State judicial officials violated Petitioners' equal protection/ due process upon §1983 and §1985 (3) specific pleading facts through unremedied misconduct/ maladministration, as well as these *General Constitutional Challenges*;

- the State's (mis)application of the "Parentage Act", R. 9:17-38, *et seq.*, violates equal protection and is unconstitutional;

- the State's track system, *i.e.*, including "differentiated case management system", R. 5:1-4, *et seq.*, especially relating to an 8-12 ½ -year old child (and/ or such age children) who prior to State action always had maintained a substantive parent-child relationship with a previously always-involved father is unconstitutional;

Stinson, 19 F.3d 873, 885 n. 11 (3rd Cir. 1994) (no bar; Federal court found that claims had merit); *Valenti v. Mitchell*, 962 F.2d 288, 296 (3d Cir. 1992) (no bar: party lacked full, fair litigation).

See also, *Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998)and *Canal Capital Corp. v. Valley Pride Pack, Inc.*, 169 F.3d 508 (8th Cir. 1999), which authorize jurisdiction absent bar. *Catz*, at 142 F.3d at 293-95, explained:

> . . . . Here, the claims that survive ... are directed to the *procedures* ... that ... [the district court] found, if true, to be "shocking"…. Thus, permitting jurisdiction does not contravene ... *Rooker-Feldman* …. *See Sun Valley Foods Co. v. Detroit Marine Terminals, Inc.*, 801 F.2d 186, 188-89 (6th Cir. 1986). ... "...[a] federal court "may entertain a collateral attack on…state…judgment… alleged…procured through fraud, deception, accident, or mistake…." *Resolute Insurance Co. v. State of North Carolina*, 397 F.2d 586, 589 (4th Cir. 1968).

Sun Valley, 801 F.2d at 189. *See also*, *Lewis v. East Feliciana Parish Sch. Bd.*, 820 F.2d 143, 146 (5th Cir. 1987) (due process challenge -- not barred).

- the State's (mis)application of the Family Therapist Privilege concerning unmarried fathers and the child/children of such fathers is unconstitutional.

B. Complaint Adequately Alleges Civil Rights Violations[21]: No Trial and No Appeal

In reliance upon *Ward v. Village of Monroeville*, 409 U.S 57 (1972), this Court reaffirmed that due process requires a neutral and detached judge. *See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993)[22] In *Clements v. Airport Authority of Washoe County*, 69 F. 3d 321, 333 (9th Cir. 1995), the 9th Circuit identified the *Ward* standard:

> A biased proceeding is not a procedurally adequate one. ...Due Process requires a hearing before an impartial tribunal [citing *Ward*].... Petitioner is entitled to a neutral

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[21] *Domestic Relations: No Exception* -- The Sixth Circuit in *Catz v. Chalker*, 142 F.3rd 279 at 290-92 (6th Cir. 1998) addressed the "Domestic Relations exception" identified in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), concluding that the exception precludes Federal jurisdiction solely upon a plaintiff's positive suit in Federal court " *...for divorce, alimony, or child custody*". Here, Petitioners present civil rights claims for effective visitation, not such a positive suit.

[22] *See also, Alexander v. Whitman*, 114 F. 3d 1392 (3rd Cir. 1997) (state rule with special impact on less than all persons: question of equal protection). Federal law supports equal protection claims: § 1983 relief against a state official who selectively enforces out of malice/ bad faith intent to injure/ punish exercise of constitutional right. *See Futernick v. Sumpter Tp.*, 78 F. 3d 1051, 1055-59 (6th Cir. 1996); *Rubinovitz v. Rogato*, 60 F. 3d 906 (1st Cir. 1995).

See also, Exxon Corp. v. Heinze, 32 F. 3d 1399 (9th Cir. 1994) (due process concerned not only with actual bias of judges, but also with appearance of justice); *American Anti-Discrimination Committee v. Reno*, 70 F. 3d 1045 (9th Cir. 1995) (use of undisclosed information in adjudication presumptively unconstitutional); and *Sloan v. Delo*, 54 F. 3d 1371 (8th Cir. 1995) (due process guarantees that State must apply its own rules fairly).

and detached judge in the first instance. *See Ward,* 409 U.S. 57, at 61-62.

The pleadings identify with specificity facts which satisfy joint action. *See Spencer v. Steinman*, 968 F.Supp. 1011, 1017-21 (E.D. Pa. 1997) ("working relationship" and/ or "joint participation" as enunciated in *Lugar v. Edmondson*, 457 U.S. 922 (1982). There is alleged that "private parties" have acted under color of law as willful participants in joint action with State officials to deprive Petitioners of Constitutional rights. Petitioners sufficiently have alleged § 1985 (3) claims with "discriminatory animus". *See Storck v. Suffolk County Dept. of Social Services*, 62 F.Supp.2d 927 (E.D.N.Y. 1999).[23]

Judge Harper's misuse of Lofas's letter was in violation of the Family Therapist Privilege, a *Kinsella*-identified principle.[24] The State has failed to observe this Court's precedent which identifies an unmarried father's § 1983 due process/ equal protection rights concerning association with his child. *See Lehr v. Robertson*, 463 U.S. 248 (1983) (unmarried father's 14th Amendment rights to rearing of his child). *See Pena v. Mattox*, 95-2053 (7th Cir.1995) (Posner, C.J.):

> "…. …Supreme Court's decisions dealing with parental rights, … [*Santowsky v. Kramer*, 455 U.S. 745] and *Stanley v. Illinois*, 405 U.S. 645],… …. add[s] equal protection …, … at 658 – understandably in view of the cases in which

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[23] Liability may be imposed on private persons even if the state actor(s) is immune. *See Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Franklin v. Terr*, 201 F.3d1098, 1100-01 (9th Cir. 2000).

[24] *See Kinsella v. Kinsella*, 150 N.J. 276, 696 A.2d 556 (1997), which addresses Rule of Evidence, R. 510 (the "**Family Therapist Privilege**"), a rule grounded upon the Federal right of privacy: "*A communication between a ... family therapist and the person or persons in therapy shall be confidential and its secrecy preserved. This privilege shall not be subject to waiver ...*" *App I at 29a.*.

the Court has protected the rights of illegitimate children. .... Stanley was an illegitimate father, as it were, and if illegitimate children are entitled to complain about discrimination in favor of legitimate children, perhaps unmarried fathers should be entitled to complain about discrimination in favor of married fathers. ....

...[W]e therefore assume that the Constitution forbids a state to deprive parents – fathers as well as mothers, including natural fathers – of their children without good reasons for doing so. .... It is not the ... biological fact of parentage, but the existence of an actual or potential relationship that society recognizes as worthy of respect and protection, that activates the constitutional claim. *Lehr v. Robertson*, 463 U.S. 248, 259-62 (1983). .... [W]hen the father ... has established a relationship with his child, the relationship receives the *prima facie* protection of the Constitution, ... *Stanley v. Illinois*, *supra*. ...."

Similarly, a child of unmarried parents has Constitutional protections. *See e.g., Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985):

"...[I]llegitimacy is beyond the individual's control ..., *Matthews v. Lucas*, 427 U.S. 495, 505, ... (1976), official discriminations ... subject to 'heightened" review'. These restrictions "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest" *Mills v. Habluetzel*, 456 U.S. 91, 99 ...(1982).").

In reliance upon *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the 11th Circuit held that § 1985 (3) applies to conspiracies grounded upon gender-based animus perpetrated under color of law. *See Lyes v. City of Riviera Beach*, 166 F.3rd 1332 (11th Cir. 1999). *Lyes* relied upon *Novotny v. Great Am. Fed. Sav. & Loan Assoc.*, 584 F.2d 1235, 1243 (3rd Cir. 1978) Here, the pleadings itemize gender-based animus against unmarried fathers, particularly bound in a State "*differentiated case management*" system and notwithstanding any Parentage Act application. More, the

pleadings itemize facts/ circumstances which evidence – for 4 years – and continuing -- a wrongful severance/ termination of an elemental civil right, *viz.*, a natural parent-child relationship. Sadly, the child's "status" as a child of unmarried parents upon unenforced Parentage Act directives likewise supports § 1985 (3) "class based invidiously discriminatory" charges.

Prerequisites have been satisfied for meritorious pleadings supporting §1983 and §1985 claims upon alleged deprivations of protected liberty interests. *See Skinner v. City of Miami*, 62 F.3d 344, 346 (11th Cir. 1995); *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52-53 (1st Cir. 1990). Similarly, the pleadings sufficiently allege deprivations of equal protection, *e.g.*, through contentions for illegal motive as alleged upon specific facts from which motive reasonably inferred and alleged specific discriminatory treatment together with support for the thesis that such discrimination was unlawful. *See Crawford-El v. Britton*, 523 U.S. 574 (1998)

In the manner identified, Judge Harper segregated this child – one of unmarried parents – for treatment different and unequal to children of married parents. *See "Parenting Time: A Child's Right" – i.e., "A ... Right"* except for a child/ children of unmarried parents. *N.J. Court Internet site at ___*: N.J. provides <u>different rules</u> for a child / children of unmarried parents as compared to a child/ children of married parents – and for the father of such child/ children. N.J. provides <u>summary</u> treatment for a child/ children of unmarried parents (and father) and precludes any "track system" to such child/ children (or father). In consequence, <u>all</u> "track system" process, *e.g.*, parenting time ("visitation"), custody, mediation, discovery, trial dates, and the like are replaced/ were replaced with hand-written notation(s) upon form orders.

In this manner, differences are State-imposed in a discriminatory manner (bias and favoritism) which promotes an arbitrary and capricious – indeed, secret and standardless – accomplishment of severance/ termination of parent-child

relationship. In consequence, New Jersey has not satisfied the *heightened scrutiny* standard for such child/ children (and father) and has acted in violation of the Equal Protection Clause.

It is obvious from the 4-year biased State trial court/ appellate court proceedings that no relief – or indeed process -- is available to the plaintiff-father or child in any manner in the State courts. The State's 3-year "no-overnight" inter-State agenda grounded solely upon prohibited use of Lofas's letter to position local "favorites", then to avoid (and validate) their non-performance for 4 months, then unfairly to dismiss a father's N.J. clerk's office-prepared complaint for visitation and paternity as soon as a meritorious ACJC grievance was revealed and Scucci's, Salvaggio's, and Hagovsky's disinterest, injurious inaction, and misconduct were exposed. Now, unlike a child of married parents – and notwithstanding the child's obvious anguish and trauma – after more than 4 years in N.J.'s system, this is where this child has remained:

- No direction for any "therapist" to assist DTB – urgently or otherwise;
- No "parenting plan";
- No visitation schedule;
- No Wednesday association -- ever;
- No telephone communications;
- No "exchange" arrangements at any place, any time, or in any manner;
- No identification of DTB's residence, telephone, cohabitation arrangements;
- No "custody" trial within 90 days – or ever;
- No amendment to DTB's birth certificate – ordered nearly 4 years ago;
- No Holiday schedule – none have occurred for 10 years;
- No mediation; and

- No identification of DTB's arrangements at American Boychoir.

Sadly, since mid-2000, the State has accomplished irrevocable injury to the child's well-being, indeed, has destroyed the child's entire "middle childhood". This has been accomplished and continues upon false excuses and irresponsible rulings – anything but reveal the misconduct and maladministration at the center of the family court "process". For such a child – and father -- the State system literally does not operate. For more than 4 years, not only has there been severed/ terminated an 8-year parent-child relationship, but also the State relentlessly has injured this child into life-long trauma. Inhumanely, the State has protected its own culpable adult personnel at the expense of an 8-12 year old defenseless child. *See generally*, *Carchman v. Korman Corp.*, 594 F.2d 354, 356 (3rd Cir.) (1979); *Pearson v. Miller*, 988 F.Supp. 848 (M.D. Pa. 1997).[25]

C. No Performance: No Immunity.

Hagovsky's motion was grounded upon *Hughes v. Long*, 242 F.3d 121 (3d Cir. 2001) ("*Hughes* II") in which there are facts/ circumstances different from those in this case[26], *e.g.*:

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[25] 11th Amendment not bar claims against the State Defendants, as here, solely for declaratory and/ or injunctive relief in official capacity. *See generally. MSA Realty Corp. v. State of Ill.*, 990 F.2d 288 (7th Cir. 1993); *Snell v. Tunnell*, 920 F.2d 673, 686, *et seq.* (10th Cir. 1990)(immunity principles); *Callahan v. City of Philadelphia*, 207 F.3d 668 (3d Cir. 2000) (11th Amendment analysis: a "*through the looking glass*" experience) .

[26] *See also*, *Snell v. Tunnell*, 920 F. 2nd 673, 689 (10th Cir. 1990):

> *An important prerequisite of absolute immunity...defendant "act as an actual functionary of the court, not only in status or denomination but in reality." [citing Gardner v. Parson*, 874 F.2nd 131, 146 (3rd Cir. 1989)]

> *...Long conducted the evaluation. She interviewed... She...referred... ....custody hearing, ...testified... and denied creating false reports ... or intentionally failing to comply with the court's order... The ...[court] adopted...recommendation and awarded joint custody ...*
>
> On appeal [*Hughes I*], we reversed .... an evidentiary record of ...[therapists] precise functions with respect to their participation in the underlying...case had not been developed..... ...[Therapist] may still be entitled to immunity if she performs "special functions".... .... We ... hold that ... [therapists] enjoy judicial immunity because they acted as "arms of the court", ...fulfills a quasi-judicial role at the court's request.
>
> *[P]erformed functions...[J]udicial immunity insulates...[therapists'] conduct..*

Here, although designated as a "therapist", Hagovsky never acted for at least 4 months – if ever. Instead, as intended, upon the father's August 28, 2000, identification of the child's distress, overtly and tacitly, Judge Harper and Salvaggio assured that Hagovsky did not receive any communication from the family court nor a copy of the August 25, 2000, order. Instead, as is Judge Harper's practice/ policy in cases concerning a child of unmarried parents (and father) together with the State's absence of "track system" for such child (or father), a secret telephone call from Salvaggio was all it took to stop Hagovsky's performance pursuant to the August 25, 2000, order – one which Hagovsky intentionally never had received.[27]

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[27] In this manner, the State wrongfully validated/ excused many years of inhumane inter-State association. Likewise, in this manner, the State wrongfully rewarded favorites in a patronage system which in reality remains disinterested in the child's "*happiness and welfare*". There has never occurred any hearing, plenary or otherwise, nor ever any scheduled.

The facts presented establish that Judge Harper and these private defendants engaged in joint action to undermine any/ all "performance" by Hagovsky. In order to assure that this plan remained effective to/ until a N.J. Appellate Division interlocutory review of the Family Therapist Privilege subject, likewise within days, secretly, Judge Harper obtained Scucci's appearance on September 8, 2000, upon contention that Scucci "*... here on another case*".[28] At this proceeding, Judge Harper assured that Scucci understood that no actual performance was to be undertaken, no actual notice was to be provided, no actual statement for services was to be provided, and no actual investigation was to be undertaken or even started. As agreed, these defendants awaited N.J. Appellate Division approval for wrongful avoidance of the Family Therapist Privilege prior to commencement of any investigation – if ever at all. In this manner, these defendants assured that as much time as possible would/ could have elapsed subsequent to the late-August, 2000, Lofas-inflicted injury to the child so that the then 8-year old child would/ could forget these events. The actors who have avoided performance have been rewarded in a system which lacks accountability and which has accomplished concealment of misconduct. These actors remain responsible for:

- **2000 – 20** days (no overnights);
- **2001 – 10** days (no overnights);
- **2002 – 15** days;
- **2003 – 1** day;
- **2004 -- 25** days
- **2005 – no** days

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[28] 5 months later, Scucci admitted that she was not at the proceeding "*on another case*". Scucci was summoned for the September 8, 2000, proceeding so as to assure that no performance could/ would occur.

In this August – December, 2000 plan and scheme not to perform, Hagovsky and Scucci did not act. These defendants have not satisfied the prerequisite for immunity: "act as an actual functionary of the court, not only in status or denomination but in reality". *Gardner, id.*. Here, Judge Harper positioned his local friends in order to avoid performance -- and none occurred. In consequence, now, for 4 years (and continuing), a severance/ termination of relationship has occurred and in reality cannot be remedied.

This is not a case where any opportunity for subsequent judicial review/ appellate review "... provides a check upon actions clothed with absolute immunity". *See Gardner, id.*, at 687, quoting *Mitchell v. Forsyth*, 472 U.S. 511, 522-23 (1985). Respectfully, this is not a case where such misconduct/ maladministration should be immunized.

More, Hagovsky's motion was premature. At best, the case was at the stage identified in *Hughes v. MacElree,* 168 F.3d 478 (3d Cir. 1998) ("*Hughes* I"), *i.e.*, "...an evidentiary record of...functions ...in...underlying custody case had not been developed". Here, there has not occurred the development of any evidentiary record. Indisputably, Hagovsky did not act pursuant to the August 25, 2000, order. More, Hagovsky's "role" at best was a mere investigator. As Hagovsky has not plead any immunity[29] nor shown that Hagovsky is a governmental official whose position involves exercise of discretion, (i) absolute immunity has been waived, (ii) and there has not occurred a shift of burden to Appellants to rebut qualified immunity. *See Pierce v. Smith,* 117 F.3d 986 (5th Cir. 1997); *Myers v. Morris*, 810 F.2d 1437, 1466-67

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[29] Hagovsky failed to contend "immunity" in 2 answers. Qualified immunity is an affirmative defense: Hagovsky bears the burden of proof. *See McKinnon v. Kwong Wah Restaurant*, 83. F.3d 498, 505 (1st Cir. 1996) (to avoid waiver, a defendant must assert all affirmative defenses in answer). *See also*, *Petrocelli v. Daniel Woodhead Co.*, 993 F.2d 27, 29 n.1 (3d Cir. 1993) (affirmative defense not raised in original pleading may be preserved).

(8th Cir. 1987) ("functional approach": separate analysis).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

DATED: New York, New York
January 17, 2005

Respectfully submitted,

Daniel J. O'Callaghan
Petitioner Pro Se and
Counsel of Record and
Attorney for Petitioner DTB
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APPENDIX A – OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AUGUST 9, 2001

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

D.T.B., a minor child, by his next friend, DANIEL J. O'CALLGHAN,	:	Civil Action No. 01-630
Plaintiffs,	:	(JAG)
v.	:	**OPINION**
HON. JOHN J. FARMER, JR., *et al.*,	:	
Defendants.	:	

GREENAWAY, JR., District Judge

INTRODUCTION

This matter comes before the Court on the motion of Defendants Attorney General John J. Farmer, Jr. ("Farmer") and the Honorable John J. Harper, J.S.C., New Jersey Superior Court, Chancery Division-Family Part, Morris County ("Judge Harper") (collectively referred to hereafter as the "Defendants")[1] to dismiss Plaintiff Daniel

[1] Defendant David F. Salvaggio is listed as a party in the motion to dismiss submitted by the Attorney General. However, the motion is put forward by the Attorney General only as to Farmer and Judge Harper. Therefore, this Court will not rule on the motion to dismiss the complaint as to Salvaggio.

J. O'Callaghan's ("O'Callaghan")[2] complaint for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1). Farmer also urges dismissal of O'Callaghan's complaint for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6).[3] O'Callaghan asserts a cause of action against the Defendants for the deprivation of a right, privilege, or immunity secured to him, arising "under the federal right of privacy, the federal right to access to courts, Article IV, Section 2, Clause 1 of the Constitution ("the "Privileges and Immunities Clause"), and the First, Fifth, Seventh, Ninth, and Fourteenth Amendments to the Constitution." (Pl.'s Amend. Compl. ¶ 1.) Additionally, O'Callaghan alleges due process and equal protection claims arising under the Fourteenth Amendment. (Id.) O'Callaghan seeks declaratory and injunctive relief under the provisions of 42 U.S.C. §§ 1983[4] and 1985(3)[5] and 28

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[2] Although O'Callaghan couches his complaint in a manner which would make it appear that he files his complaint on behalf of his son ("DTB"), in reality, O'Callaghan is alleging constitutional violations on the part of Farmer and Judge Harper against both himself and his son. For purposes of clarity, this Court will refer only to O'Callaghan. However, our analysis applies as to both O'Callaghan and DTB.

[3] Federal Rules of Civil Procedure 12(b) states, in pertinent part, that:

> [e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter; ... (6) failure to state a claim upon which relief can be granted.

[4] 42 U.S.C. § 1983 (1994) provides, in pertinent part, that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes or causes to be subjected, any citizen of the United Sates or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

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U.S.C. §§ 2201[6] and 2202.[7] For the reasons set forth below, this Court concludes that the motion to dismiss for lack of subject matter jurisdiction is GRANTED as to Defendants Farmer and Judge Harper, with prejudice.

BACKGROUND

Pro se Plaintiff Daniel J. O'Callaghan is the natural father of nine-year old Plaintiff DTB. (Pl.'s Amend. Compl. ¶ 12.) O'Callaghan filed suit against "VRB", the natural mother of DTB, in New Jersey Superior Court,

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the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[5] 42 U.S.C. § 1985(3) (1994) provides, in pertinent part, that:

> [i]f two or more persons in any State or Territory conspire for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

[6] 28 U.S.C. § 2201 (1994) provides, in pertinent part, that:

> [i]n case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[7] 28 U.S.C. § 2202 (1994) provides that:

> [f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Chancery Division-Family Part, Morris County, on June 22, 2000, for paternity, custody, and/ or visitation concerning DTB, pursuant to the N.J. STAT. ANN. §§ 9:17-39, 40 (West 1993). (Id. at ¶ 7, 13.) Defendant Judge Harper presided over O'Callaghan's custody suit. (Id. at ¶ 7.) Following a hearing on August 25, 2000, Judge Harper terminated all overnight visitation for Plaintiff O'Callaghan with his son. (Id. at ¶ 42.) In or about late October, 2000, O'Callaghan petitioned the New Jersey Appellate Division and the New Jersey Supreme Court upon discretionary interlocutory motions for leave to appeal, including requests for federal constitutional relief. (Id. at ¶ 86.) On December 4, 2000, the Appellate Division denied interlocutory relief. (Id. at ¶ 89.) On January 24, 2001, the New Jersey Supreme Court denied interlocutory relief. (Id. at ¶ 115.)

During the early part of January 2001, O'Callaghan filed a complaint with the State Advisory Committee on Judicial Conduct relating to a December 8, 2000 proceeding regarding alleged abusive behavior on the part of Judge Harper. (Id.) On February 6, 2001, Judge Harper issued an order and letter decision, in which he dismissed O'Callaghan's Family Court complaint and directed sanctions against O'Callaghan in the amount of ten thousand dollars ($10,000). (Id. at ¶ 123.) Judge Harper dismissed O'Callaghan's complaint for custody and/ or visitation as a result of O'Callaghan's "failure to follow the orders of the court and O'Callaghan's repeated efforts to frustrate and delay the fact-finding process." (Let. Dec. at 7.) (Attached as Exhibit to Affadavit of O'Callaghan, Volume II, pg. 805.) Further, Judge Harper ordered sanctions in an effort to place responsibility for the delays in the Family Court case upon O'Callaghan. Id. In his decision, Judge Harper ordered non-overnight visitation to continue. Id.

Thereafter, on February 14, 2001, O'Callaghan

sought emergent relief from the Appellate Division, alleging a violation of constitutional safeguards. (Id. at ¶ 131.) On February 16, 2001, this application for emergent relief was denied. (Id.) Subsequently, on February 26, 2001, O'Callaghan sought interlocutory appellate relief on similar grounds in a motion for leave to appeal to the New Jersey Supreme Court, presented to the New Jersey Appellate Division. (Id. at ¶ 132.) However, on April 16, 2001, the Appellate Division denied O'Callaghan's motion for interlocutory relief. (Pl. Let. 2.)[8] The Appellate Division ruled that the February 6, 2001 order and letter decision by Judge Harper was a final order, and that the order may be appealed pursuant to a notice of appeal. (Id. at 3.) In turn, on April 25, 2001, O'Callaghan filed an application with the New Jersey Supreme Court for emergent and interlocutory relief. (Id. at 2.) In this application, O'Callaghan argued that the Appellate Division failed to review the substantive merit of any of his claims, and that further delay was harming his relationship with his son. (Id.) It appears that the application before the New Jersey Supreme Court is still pending.[9] In addition, it appears that in late April 2001, O'Callaghan filed a motion for leave to appeal with the Appellate Division once notified that the February 6, 2001 order and letter decision by Judge Harper constituted a "final order." (O'Callaghan's Supplemental Brief Upon Motion For Leave to Appeal and Brief Upon Appeal to the Superior Court of New Jersey-Appellate Division) (Attached as Exhibit to Affidavit of O'Callaghan, Volume III.) In his appeal to the Appellate Division, O'Callaghan raised many of the same arguments that have been raised in his federal

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[8] "Pl. Let." Refers to Plaintiff O'Callaghan's letter to the Court dated April 27, 2001.

[9] To the best of this Court's knowledge from the respective parties' submissions, the application to the New Jersey Supreme Court is still pending.

civil rights complaint. The appeal to the Appellate Division also appears to be outstanding.[10]

On February 7, 2001, O'Callaghan filed a complaint in this Court alleging the aforementioned Civil Rights violations. (Pl.'s Amend. Compl. ¶ 130.) In response, on March 26, 2001, Defendants filed a motion to dismiss. On April 6, 2001, O'Callaghan amended his complaint. O'Callaghan raises approximately seventeen allegations of judicial misconduct in his amended complaint.[11] In his amended complaint, O'Callaghan initially requests a declaratory judgment, pursuant to 28 U.S.C. § 2201, that Judge Harper and Farmer violated O'Callaghan's right of access to courts, right to privacy, Fourteenth Amendment Due Process/ Equal Protection rights, and right to [*sic*] a jury trial. O'Callaghan further requests relief, pursuant to 42 U.S.C. §§ 1983 and 1985(3).[12] (Id. at ¶ 158.)

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[10] This Court, in its best estimation following review of every document submitted by both parties, believes that an appeal to the Appellate Division regarding the final order of Judge Harper is also still outstanding.

[11] This Court will not review each allegation of judicial misconduct alleged by O'Callaghan. In O'Callaghan's fifty-page complaint, he recites in explicit detail, every proceeding that occurred before Judge Harper in O'Callaghan's Family Court case. For the purposes of this motion to dismiss, this Court finds it unnecessary to review O'Callaghan's allegations concerning misconduct on the part of Judge Harper.

[12] Specifically, O'Callaghan requests that this Court grant the following relief:

1. A declaration of violation of 42 U.S.C. § 1983;

2. A declaration of violation of 42 U.S.C. § 1985(3);

3. A declaration of unconstitutionality of New Jersey Court Rule 5:8B "Appointment of Guardian Ad Litem";

4. A declaration of unconstitutionality of New Jersey Court Rule 5:1-4, "Case Management Track System";

O'Callaghan further requests injunctive relief because he and his son are allegedly experiencing continuing irreparable injury and have no plain, speedy, or adequate remedy at law. (Id. at ¶ 166, 168.) In O'Callaghan's injunctive relief claim, he requests that this Court 1) enjoin enforcement of all orders, findings, decisions, and judgments issued in the Family Court case, 2) direct reinstatement of O'Callaghan's Family Court complaint, 3) direct a visitation rights hearing and custody trial in compliance with the State's "track system," 4) direct the transfer of the case to another Family Court judge, and 5) direct that all proceedings and the record in the Family Court case be made confidential. (Id. at ¶ 168.)

Defendants move to dismiss on all counts.

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5. A declaration of unconstitutionality of New Jersey Court Rule 5;3-3, "Appointment of Experts";

6. A declaration of unconstitutionality of New Jersey Court Rule 5:8-1, *et seq.*, "Custody of Children";

7. A declaration of violation of DTB's and O'Callaghan's right of access to the courts;

8. A declaration of violation of DTB's and O'Callaghan's right of privacy;

9. A declaration of violation of DTB's and O'Callaghan's Fourteenth Amendment rights to due process of law and to equal protection of the laws;

10. a declaration of violation of O'Callaghan's right to a jury trial;

11. a declaration that there existed a plan and conspiracy, in violation of 42 U.S.C. § 1983;

12. a declaration that there has exited a plan and conspiracy, in violation of 42 U.S.C. § 1985(3);

13. grant of injunctive relief, pursuant to 42 U.S.C. § 1983, to the extent authorized by controlling law, and pursuant to 42 U.S.C. § 1985(3) upon the grounds identified herein.

(Pls.'s Amend. Compl. ¶ 179.)

Defendants assert that the Rooker-Feldman doctrine precludes this Court from exercising subject matter jurisdiction. Furthermore, Defendants argue that this Court should not exercise subject matter jurisdiction as a result of the Younger, Pullman, and/ or Burford abstention doctrines. Moreover, Farmer claims that O'Callaghan's complaint, with respect to himself, must be dismissed for failure to state a claim upon which relief can be granted. Finally, Defendants assert that the complaint must be dismissed because O'Callaghan has failed to show that he is entitled to injunctive relief.

DISCUSSION

The Defendants' primary argument is that this Court does not have jurisdiction to review any of the claims O'Callaghan brought forward. Section 1257 of Title 28 provides that "[f]inal judgments or decrees rendered by the highest court of a State ... may be reviewed by the Supreme Court." 28 U.S.C. § 1257 (1994). In District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) and Rooker v. Fidelity Trust Company, 263 U.S. 413 (1923), the Supreme Court interpreted 28 U.S.C. § 1257 to bar direct review of state supreme court decisions in any federal court except the Supreme Court of the United States. A district court has "no authority to review final judgments of a state court in judicial proceedings" and "[r]eview of such judgment may be had only in this Court." Feldman, 460 U.S. at 482. The doctrine also applies to final decisions of lower state courts. Port Auth. Benevolent Ass'n. v. Port Auth. of N.Y. and N.J., 973 F.2d 169, 177 (3d Cir. 1992).

The Supreme Court noted that "[i]f the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's [decision] in a judicial proceeding, then the district court is in essence being called upon to review the state court decision. This the district court may not do." Feldman,

460 U.S. at 483 n. 16.

In Centifanti v. Nix, 865 F.2d 1422, 1430 (3d Cir. 1989), the Third Circuit quoting Justice Marshall in Pennzoil v. Texaco, Inc. 481 U.S. 1 (1987), provided guidance in determining when a constitutional claim is "inextricably intertwined" with a particular decision of a state court for purposes of barring the district court's jurisdiction to hear the case under the Rooker-Feldman doctrine. The court stated that:

> [w]hile the question of whether a federal constitutional challenge is inextricably interwined with the merits of a state court judgment may sometimes be difficult to answer, it is apparent, as a first step, that the federal claim is inextricably intertwined with the state court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state court judgment.

Centifanti, 865 F.2d at 1430 (quoting Pennzoil, 481 U.S. at 25.)

Thus, Rooker-Feldman applies only when in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered or must take action that would render that judgment ineffectual. Focus v. Allegheny County Ct. of C.P., 75 F.3d 834 (3d Cir. 1996). Moreover, the Supreme Court has emphasized that a district court still does not have jurisdiction over "challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." Stern v. Nix, 840 F.2d 208, 211 (3d Cir. 1988) (citing Feldman, 460 U.S. at 486). Therefore, district courts must evaluate whether the

relief requested by the complainant would void the state court's ruling. Accordingly, a compliant which essentially appeals a final state court decision must be dismissed for lack of subject matter jurisdiction.

O'Callaghan raises two different types of claims in his complaint. This Court will first address O'Callaghan's claim that a multitude of his constitutional rights were violated by Judge Harper in his family court proceeding.[13] As previously noted, Rooker-Feldman precludes a federal district court from evaluating constitutional claims that are "inextricably intertwined" with a state court judicial proceeding. Feldman, 460 U.S. at 483 n. 16. The specific Rooker-Feldman jurisdictional inquiry presented in this case is whether O'Callaghan's claims of the deprivation of numerous constitutional safeguards are "inextricably intertwined" with the Family Court's decisions Judge Harper reached.

O'Callaghan asks this Court to review his state court proceedings and to arrive at the conclusion that Judge Harper violated his constitutional rights. It is clear from both the recitation of facts and the relief sought that O'Callaghan is attempting to appeal the decision reached by Judge Harper. O'Callaghan submits approximately 40 pages of facts detailing what occurred at the state trial court level and how the alleged constitutional violations occurred. Theses constitutional claims are unquestionably "inextricably intertwined" with the state court judicial proceeding.

O'Callaghan then requests that this Court grant declaratory and injunctive relief, which would have the effect of reversing the state court's decision. This is not permissible under the Rooker-Feldman doctrine. Focus, 75 F.3d at 834. A careful review of O'Callaghan's claims has convinced this Court that O'Callaghan is essentially asking

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[13] See supra page 2.

this Court to reverse the decisions made by the state court. O'Callaglhan has not even tried to hide the fact that the purpose of his lawsuit is to enjoin the enforcement of the state court's decision. (Pl. Amend. Compl. ¶ 172.) In addition, in order to evaluate O'Callaghan's constitutional claims (that he was denied equal protection and due process), this Court would have to determine that the state court "wrongly decided" the custody and/ or visitation issue. Centifanti, 865 F.2d at 1430. As previously discussed, this is not permissible under Rooker-Feldman. See Logan v. Lillie, 965 F. Supp. 695, 699 (E.D. Pa. 1997). Therefore, this Court lacks subject matter jurisdiction to address O'Callaghan's claims regarding the constitutionality of the state court proceedings.

A district court's role in a case such as the one at bar becomes slightly more complicated when presented with general facial constitutional challenges to state laws or rules. As previously noted, O'Callaghan urges that New Jersey Court Rules 5:1-4, 5:3-3, and 5:8-1 are unconstitutional. Under Rooker-Feldman, district courts have subject matter jurisdiction to review general challenges to state rules or laws. Feldman, 460 U.S. at 483. Thus, the jurisdictional issue in this case turns upon whether O'Callaghan's constitutional challenges should be viewed as 'general challenges" or as a challenge to a state court decision in a "particular case." Stern, 840 F. 2d at 212.

In Stern, the Third Circuit dismissed a complaint by a disbarred attorney challenging two Pennsylvania disciplinary rules. The complaint expressly indicated that the attorney did not seek direct review, but intended to generally challenge the constitutionality of the rules. Id. The Third Circuit concluded that "[d]espite this genuflecting to the Rooker-Feldman doctrine," the purpose of the action was to reverse the decision of the Supreme Court of Pennsylvania to disbar the plaintiff. Id. The

Court reasoned that the complaint contained excessive factual detail and sought a permanent injunction preventing the Supreme Court of Pennsylvania from disbarring attorney without employing certain procedural safeguards. Id. The Third Circuit concluded that:

> [i]n a sense, any attempt to enjoin the enforcement of a state court judgment, even conditionally, as in this case, is suspect. If it granted Stern's requests, the federal court would effectively reverse the state court judgment, and thus "review [a] final judgment [ ] of a state court in judicial proceedings," contrary to Rooker-Feldman.

Id.

O'Callaghan's constitutional challenges of the aforementioned New Jersey Court rules are similar to those put forward in Stern. While it appears from O'Callaghan's complaint that he facially challenges the New Jersey Court Rules, problems nonetheless arise when analyzing the remedy that he proposes. O'Callaghan requests that this Court grant declaratory as well as injunctive relief. As O'Callaghan himself points out, he has no plain, speedy, or adequate remedy at law and that therefore injunctive relief is necessary. (Pl. Amend. Compl. ¶ 170.) Specifically, O'Callaghan requests that if this court were to find any of the three New Jersey Court Rules unconstitutional, the Court should "enjoin enforcement of all orders, findings, decisions, and judgments, including the letter decision and the ten-thousand dollar ($10,000) order, issued in the Family Court case." (Id. at ¶ 172.) Injunctive relief in this case would effectively reverse the state court judgment, and thus "review a final judgment of a state court in a judicial proceeding," contrary to Rooker-Feldman. Stern, 840 F.2d at 212. Therefore, this Court interprets O'Callaghan's facial constitutional challenges as nothing more than an

attempt to have this Court reverse a state court decision.[14]

This court must emphasize the fact that O'Callaghan has not exhausted his state avenues of appeal. At this time, to the best of this Court's knowledge, two appeals (one to the Appellate Division and one to the New Jersey Supreme Court) remain outstanding. This Court will not analyze constitutional questions that have been posed to the Appellate Division and the New Jersey Supreme Court but have not yet been answered. This would be in clear violation of the Rooker-Feldman doctrine. Even if the Appellate Division denies his appeal, O'Callaghan can still appeal that denial to the New Jersey Supreme Court. Moreover, if the New Jersey Supreme Court denies an appeal of the Appellate Division's decision, the correct avenue for O'Callaghan would be to appeal that decision to the Supreme Court of the United States. See 28 U.S.C. § 1257. This Court has no role in this process. As this Court has already discussed, O'Callaghan's facial challenges are actually a disguised attempt to seek review of the Family Court decision. See Stern, 840 F.2d 208. Accordingly, this Court will grant the motion to dismiss because this Court lacks the subject matter jurisdiction to hear the case under the Rooker-Feldman doctrine.[15]

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[14] In light of the fact that this Court finds that the Rooker-Feldman doctrine applies, we need not address the Younger, Pullman, and Burford abstention doctrines that were raised by the Defendants in their motion to dismiss.

[15] See also Logan v. Lillie, 965 F. Supp. 695 (E.D. Pa. 1997):

> [t]he Court's decision is consistent with the clear trend of case authority holding that actions brought under §§ 1983 and 1985 but which are bottomed on claims of constitutional violations arising out of state court child custody proceedings are "inextricably intertwined" with such custody proceedings and therefore are barred under the Rooker-Feldman doctrine from the subject matter jurisdiction of the federal courts. See e.g., United States ex rel. Verdone v. State of Wis., 1995 WL 94914 at *2 (7th Cir. 1995) (finding that district court was barred under Rooker-Feldman from

Conclusion

For the foregoing reasons, this Court grants Judge Harper and Attorney General Farmer's motion to dismiss.

An appropriate order has been attached.

S/ Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR., U.S.D.J.

DATED: August 9th, 2001

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hearing federal civil rights action bottomed on claims of constitutional violations arising out of state court custody proceedings); Chrissy F. v. Miss. Dep't of Pub. Welfare, 995 F.2d 595, 598-599 (5thCir. 1993) (finding that district court was barred under Rooker-Feldman from hearing federal civil rights action bottomed on claims of constitutional violations arising out of state court custody proceedings), cert. denied, 510 U.S. 1214; Liedel v. Juv. Ct. of Madison County, Ala., 891 F.2d 1542, 1545-1546 (11th Cir. 1990) (finding that district courts have no jurisdiction under Rooker-Feldman to hear § 1983 actions bottomed on constitutional claims arising out of state court child custody proceedings); Thompson v. McFatter, 951 F. Supp. 221, 223-223 (M.D. Ala. 1996) (finding that district court was barred under Rooker-Feldman from hearing a § 1983 action where plaintiff's complaint alleged constitutional violations of his rights of association, due process, and equal protection arising out of state court custody proceedings); Behr v. Snider, 900 F. Supp. 719, 724-725 (E.D. Pa. 1995) (finding that district court was barred under Rooker-Feldman from hearing federal civil rights action brought under §§ 1983 and 1985 bottomed on claims for declaratory and injunctive relief and monetary damages for alleged due process, equal protection, and other constitutional violations arising out of state court custody proceeding).

965 F. Supp. at 699 n.6.

APPENDIX B – ORDER OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AUGUST 9, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

D.T.B., a minor child, by his, next friend, DANIEL J. O'CALLGHAN,	:	Civil Action No. 01-630 (JAG)
Plaintiffs,	:	
v.	:	**ORDER**
HON. JOHN J. FARMER, JR., *et al.*,	:	
Defendants.	:	

This matter having come before the Court on the motion of Attorney General John J. Farmer and the Honorable John J. Harper, J.S.C., New Jersey Superior Court, Chancery Division-Family Part, Morris County (Defendants), to dismiss Daniel O'Callaghan's Complaint against Defendants for lack of subject matter jurisdiction, pursuant to Federal Rules of Civil Procedure 12 (b)(1); and it appearing that O'Callaghan brought a civil suit against his former wife concerning the paternity, custody, and/ or visitation with respect to their child in New Jersey Superior Court, Chancery Division-Family Part, Morris County before Defendant Judge Harper; and it further appearing that Judge Harper extinguished O'Callaghan's overnight visitation privileges with his child; and it further appearing that O'Callaghan made numerous applications to both the New Jersey Superior Court, Appellate Division ("Appellate Division") and the New Jersey Supreme Court ("Supreme

Court") concerning interlocutory and emergent relief; and it further appearing that the Appellate Division and the Supreme Court denied O'Callaghan's motions for relief; and it further appearing that appeals to the Appellate Division and the Supreme Court remain outstanding; and it further appearing that O'Callaghan filed a Complaint with this Court asserting that Defendants Harper and Farmer violated several of his constitutional rights, including due process and equal protection claims arising under the 14th Amendment; and it further appearing that O'Callaghan seeks declaratory and injunctive relief; and this Court having concluded that this matter should be dismissed, consistent with District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) and Rooker v. Fidelity Trust Company, 263 U.S. 413 ('923) (Rooker-Feldman doctrine); and this Court further concluding that O'Callaghan's allegations against Defendants are "inextricably intertwined" with the Family Court's decision; and this Court having further concluded that O'Callaghan's Complaint is essentially an appeal of a state court decision; and for other good cause shown;

IT IS ON THIS 9th day of August, 2001;

ORDERED that Defendants' motion to dismiss O'Callaghan's Complaint as to Judge Harper and Attorney General Farmer is GRANTED and O'Callaghan's Complaint is dismissed with prejudice as to those two parties; and

IT IS FURTHER ORDERED that an opinion will issue in due time; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within (7) days of this Order

S/Joseph A. Greenaway, Jr.

JOSEPH A. GREENAWAY, JR., U.S.D.J.

APPENDIX C – AMENDED ORDER OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED DECEMBER 17, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

D.T.B., a minor child, by his next friend, DANIEL J. O'CALLGHAN,	:	Civil Action
	:	No. 01-630
Plaintiffs,	:	(JAG)
	:	
v.	:	
	:	**AMENDED**
HON. JOHN J. FARMER, JR., *et al.*,	:	**ORDER**
	:	
Defendants.	:	
	:	

GREENAWAY, JR., U.S.D.J.

This matter having come before the Court on the motion of Attorney General John J. Farmer and the Honorable John J. Harper, J.S.C., New Jersey Superior Court, Chancery Division-Family Part, Morris County ("Defendants"), to dismiss Plaintiff Daniel O'Callaghan's ("O'Callaghan") Complaint against Defendants for lack of subject matter jurisdiction, pursuant to Federal Rules of Civil Procedure 12 (b)(1); and it appearing that O'Callaghan amended his Complaint on April 9, 2001 ("Amended Complaint"); and this Court having previously concluded that the Amended Complaint should be dismissed in its August 9, 2001 Order, consistent with the District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) and Rooker v. Fidelity Trust Company,

263 U.S. 413 (1923) (Rooker-Feldman doctrine); and it further appearing that the parties are unclear as to whether the August 19, 2001 Order addressed O'Callaghan's Amended Complaint; let it be clear that this Court did contemplate and address O'Callaghan's Amended Complaint it its August 19, 2001 Order;

IT IS ON THIS 17th day of December, 2001:

ORDERED that Defendants' motion to dismiss O'Callaghan's Amended Complaint as to Judge Harper and Attorney General Farmer is GRANTED and O'Callaghan's Amended Complaint is dismissed with prejudice as to those two parties; and

IT IS FURTHER ORDERED that a copy of this Order shall be served on all parties within (7) days of this Order.

S/Joseph A. Greenaway, Jr.

JOSEPH A. GREENAWAY, JR., U.S.D.J.

APPENDIX D -- ORDER OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED SEPTEMBER 26, 2003

Michael S. Schwartz, Esq.
HEIM & MCENROE
12 Vreeland Road
P.O. Box 975
Florham Park, NJ 07932
(973) 360-6200
Attorneys for Defendant
Mathias R. Hagovsky

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

D.T.B., a minor child, by his next friend, DANIEL J. O'CALLAGHAN and DANIEL J. O'CALLAGHAN, Pro Se, on his own behalf, Plaintiffs, v. HON. JOHN J. FARMER, JR. in his past or present official capacity as Attorney General of the State of New Jersey; HON. JOHN J. HARPER in in his past or present capacity as Justice of the Superior Court of New Jersey, Chancery Division, Family Part; ANN T. SCUCCI; MATHIAS R. HAGOVSKY and DAVID F. SALVAGGIO, Defendants.	CIVIL ACTION 2001-CV-630(JAG) 2001-CV-4032((JAG) **ORDER GRANTING SUMMARY JUDGMENT**

This matter having come before the Court on Defendant Mathias R. Hagovsky's Motion for Summary Judgment pursuant to Federal Rules of Civil Procedure 56(b), and it appearing that Plaintiff's Complaint against Defendant Mathias R. Hagovsky lacks subject matter jurisdiction consistent with District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) and Rooker v. Fidelity Trust Company 263 U.S. 413 (1923) (Rooker-Feldman doctrine); and this Court concluding that regardless of subject matter jurisdiction, Defendant Mathias R. Hagovsky is immune from liability, as a court appointed psychologist pursuant to Hughes v. Long 242 F.3d 121 (3rd Cir. 2001) and the Court having considered all papers submitted and having entertained oral argument on September 22, 2003;

IT IS hereby O R D E R E D that Defendant Mathias R. Hagovsky's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(b) is hereby granted; and it is further

O R D E R E D that plaintiff's Complaints are hereby dismissed with prejudice for lack of subject matter jurisdiction; and it is further

O R D E R E D that a copy of this Order be served upon all counsel within seven (7) days of the date hereof.

S/Joseph A. Greenaway, Jr.

JOSEPH A. GREENAWAY, JR., U.S.D.J.

S/ 9-26-03

APPENDIX E – OPINION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 14, 2004

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

D.T.B., a minor child, by his next friend,
Daniel J. O'Callaghan; DANIEL J. O'CALLAGHAN,
Appellants

v.

JOHN J. FARMER, Hon., in his past or present official capacity as Attorney General of the State of New Jersey; JOHN J. HARPER, Hon., in his past or present capacity as Justice of the Superior Court of New Jersey, Chancery Division, Family Part; DAVID F. SALVAGGIO; MATHIAS R. HAGOVSKY; ANN T. SCUCCI

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(No. 01-cv-00630)
Hon. Joseph A. Greenaway, Jr.

Submitted Under Third Circuit LAR 34.1(a)
June 16, 2004

Before: ALITO and SMITH, Circuit Judges, and DUBOIS, District Judge*
(Opinion Filed: September 14, 2004

---

*Hon. Jan E. DuBois, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

PER CURIAM:

This appeal stems from litigation in the New Jersey Superior Court, Family Part. Plaintiff Daniel J. O'Callaghan filed a paternity, custody, and / or visitation action against V.R.B., the mother of O'Callaghan's minor son. Defendant Judge Harper presided over the case and terminated O'Callaghan's overnight visitation rights. After O'Callaghan failed to obtain interlocutory relief in the Appellate Division and the New Jersey Supreme Court, he filed a complaint against Judge Harper with the State Advisory Committee on Judicial Conduct, but this also proved unsuccessful. Judge Harper eventually dismissed O'Callaghan's complaint and imposed sanctions for procedural violations. O'Callaghan then made additional efforts to obtain appellate review in the New Jersey courts.

Greatly dissatisfied with the state court litigation, O'Callaghan subsequently filed this action in federal court asserting numerous federal constitutional and statutory claims against the judge, the former state attorney general, a court appointed psychologist, and others. The District Court dismissed the plaintiffs' claims against the judge and former attorney general pursuant to the Rooker-Feldman doctrine and issued a detailed opinion explaining the basis of its decision. For essentially the reasons stated in that opinion, we hold that these claims were properly dismissed. We appreciate the importance of O'Callaghan's concerns, but the claims asserted in the present federal action are inextricably intertwined with the state court decisions, and the lower federal courts accordingly lack jurisdiction to entertain those claims.

BEST AVAILABLE COPY

The District Court granted summary judgment in favor of the court-appointed psychologist, holding that she was entitled to absolute immunity under Hughes v. Long, 242 F.3d 121 (3d Cir. 2001). We agree with this ruling.

We have carefully considered all of the arguments advanced by the appellant but see no ground for reversing the District Court's disposition of any of the claims asserted against any of the defendants. Accordingly, the orders from which the appeal were taken are affirmed.

APPENDIX F – JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 14, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4259

D.T.B., a minor child, by his next friend, Daniel J. O'Callaghan; DANIEL J. O'CALLAGHAN,
Appellants

v.

JOHN J. FARMER, Hon., in his past or present official capacity as Attorney General of the State of New Jersey; JOHN J. HARPER, Hon., in his past or present capacity as Justice of the Superior Court of New Jersey, Chancery Division, Family Part; DAVID F. SALVAGGIO; MATHIAS R. HAGOVSKY; ANN T. SCUCCI

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(No. 01-cv-00630)
Hon. Joseph A. Greenaway, Jr.

Submitted Under Third Circuit LAR 34.1(a)
June 16, 2004

Before: ALITO and SMITH, Circuit Judges, and DUBOIS, District Judge[1]

[1]Hon. Jan E. DuBois, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a) on June 16, 2004.

After careful review and consideration of all contentions raised by the appellant, it is hereby ORDERED and ADJUDGED that the judgments of the District Court entered on April 4, 2003 and November 26, 2003, be and is hereby AFFIRMED. Costs taxed against appellant. All in accordance with the opinion of this Court.

ATTEST:

S/ Marcia M. Waldron

Clerk

DATED: September 14, 2004

Certified as a true copy and issued in lieu of a formal mandate on October 28, 2004.

Teste:

S/ Marcia M. Waldron

Clerk, United States Court of Appeals for the Third Circuit

APPENDIX G – DECISION UPON SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 20, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4259

D.T.B., a minor child, by his next friend,
Daniel J. O'Callaghan; DANIEL J. O'CALLAGHAN,
Appellants

v.

JOHN J. FARMER, Hon., in his past or present official capacity as Attorney General of the State of New Jersey; JOHN J. HARPER, Hon., in his past or present capacity as Justice of the Superior Court of New Jersey, Chancery Division, Family Part; DAVID F. SALVAGGIO; MATHIAS R. HAGOVSKY; ANN T. SCUCCI

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, and VAN ANTWERPEN, Circuit Judges, and DuBOIS, District Judge*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service,

*As to panel rehearing only.

and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court

/s/ Samuel A. Alito, Jr.

Circuit Judge

DATED: October 20, 2004

lwc/cc: Daniel J. O'Callaghan, Esq.
George N. Cohen, Esq.
Michael S. Schwartz, Esq.

APPENDIX H – FEDERAL RULES OF CIVIL PROCEDURE (IN PART)

Federal Rules of Civil Procedure, Rule 12 (b), in part:

Rule 12. Defenses and Objections

...

(b) How presented. Every defense, in law or fact, ... shall be asserted in the responsive pleading ... except that the following defenses may ... be made by motion: (1) lack of jurisdiction over the subject matter, ... (6) failure to state a claim upon which relief can be granted ...

Federal Rules of Civil Procedure, Rule 56, in part:

Rule 56. Summary Judgment.

...

(b) For Defending Party. A party against whom a claim, ... is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

APPENDIX I – PARENTAGE ACT, FAMILY THERAPIST PRIVILEGE

New Jersey Parentage Act

9:17-39. Parent and child relationship defined.

As used..., "parent and child relationship" means the legal relationship existing between a child and the child's natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties, obligations. It includes the mother and child relationship and the father and child relationship.

9:17-40. Extent of parent and child relationship.

The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

9:17-42. Closed court; confidentiality of records.

Notwithstanding any other law concerning public hearings and records, any action or proceeding held under this act, shall be held in closed court … all papers and records and any information … are confidential….

9:17-45. Parties. ….

(a) A child, … the natural mother, … a man alleged or alleging himself to be the father … may bring or defend an action or be made a party … at any time for the purpose of determining the existence or nonexistence of the parent-child relationship.

Family Therapist Privelege (R. of Evidence 510)

A communication between a marriage and family therapist and the person or persons in therapy shall be confidential and its secrecy preserved. This privilege shall not be subject to waiver …

APPENDIX J -- FAMILY COURT RULES

R. 5:1-4. Differentiated Case Management.

(a) Case Management Track; Standards for Assignment. Except for summary actions, every civil family action shall be assigned, ... to one of the following tracks as follows:

(1) *Priority Track*. The action shall be assigned ... if it involves contested custody or parenting time issues.

(2) *Complex Track*. The action shall be assigned ... [if] likely ... disproportionate expenditure of ... resources. ....

(3) *Expedited Track*. The action shall be assigned..promptly tried...[A married family] dissolution action shall be assigned to the expedited track....

(4) *Standard Track*. Any action not qualifying for ... [above] shall be assigned to the standard track.

(b) Procedure for Track Assignment. The presiding judge...shall make the track assignment..after all parties have filed Case Information Statements..R. 5:5-2 or after the case management conference..R. 5:5-6 ...The parties shall be promptly advised by the court of the track assignment.

R. 5:3-3. Appointment of Experts. ...

(c) Selection of Experts. ...The court shall establish the scope of the expert's assignment in the order of appointment ....

(d) Investigation by Experts. ... The parties shall be entitled to have their attorneys and/ or experts present during any examination ...

R. 5:4-1. Process.

(a) Summons Generally. ....

(b) Summons, Summary Family Action. In every family action required or permitted ... to proceed summarily, a summons shall issue .... The summons shall comply with ... [civil practice rules] except that in lieu of requiring an answer it shall notify the defendant to appear at the time, date and place therein set forth to answer the complaint, a copy of which shall be annexed thereto. It shall also notify the defendant that unless the defendant appears ... an order may be entered by default...

R. 5:4-2. Complaint.

(a) Complaint Generally.

(1) *Caption.*

(2) *Contents.* ... [S]tatement of the essential facts ... relief sought ...

In any non-dissolution action ... in which paternity was previously acknowledged ..., a copy of the Certificate of Parentage or other written acknowledgment ... shall be filed with the complaint for support.

....

R. 5:4-3. Answer.

(a) Generally. Except as otherwise provided by paragraph (b) hereof or by any other rule or statute, a defendant in a family action shall file an answer... R. 4:5-3 [civil practice rules] or a general appearance and, without filing an answer, be heard on issues of custody of children, parenting time or visitation ...

(b) In summary family actions in which the process fixes a return day, the defendant need not file an answer, ... in order to be heard if the defendant appears on the return day.

R. 5:5-2. Case Information Statement.

(a) Applicability. The case information statement ... shall be filed and served in all contested family actions, except summary actions, in which there is any issue as to custody, support, alimony or equitable distribution. In all other family actions, a case information statement may be required by order on motion of the court or a party.

(b) Time and Filing. ... [A] case information statement ... (a) shall be filed by each party ... within 20 days after the filing of an answer or appearance. .... The court ... may ... dismiss a party's pleadings for failure to have filed a Case Information Statement. If dismissed, said pleadings shall be subject to reinstatement upon such conditions as the court may deem just.

R. 5:5-6. Case Management Conferences in Civil Family Actions.

(a) Priority in Complex Actions. ... [A]n initial case management conference ... shall be held within 30 days after ... last ... responsive pleading ... . Following the conference, the court shall enter an initial case management order ... scheduling a second case management conference ... The second ... order shall ... fix a firm trial date.

(b) Standard and Expedited Cases. [A] case management conference ... shall be held within 30 days after .. last ... responsive pleading.... Following the conference, the court shall enter a case management order fixing ... firm trial date.

R. 5:6. Summary Support Action for Support.

5:6-1. When and By Whom Filed. ... [A] summary action for support may be brought by either the party entitled thereto or an assistance agency ...

5:6-3. Hearing. The court shall hear and determine the matter in a summary manner on the return day fixed in the process ...

R. 5:8. Custody of Children.

5:8-1. Investigation Before Award. In family actions where the court finds that the custody of children is a genuine and substantial issue the court shall refer the case to mediation .... If the mediation is not successful ... the court may ... require an investigation to be made by the county probation office .... [T]he probation office shall file its report with the court no later than 45 days after its receipt of the ... order requiring the investigation ...

5:8-5. Custody and Parenting Time/ Visitation Plans...

(a) In any family action in which the parties cannot agree to ... custody or parenting time/ visitation ..., the parties must each submit a ... [Parenting Plan] ... no later than 75 days after the last responsive pleading ...

(b) ....

(c) Failure to comply with the ... [Parenting Plan] may result in ... dismissal of ... pleadings .... Dismissed pleadings shall be subject to reinstatement upon such conditions as the court may order.

5:8-6. Trial of Custody Issue. Where the court finds that the custody of children is a genuine and substantial issue, the court shall set a hearing date no later than 3

months after the last responsive pleading. .... As part of the custody hearing, ... conduct an interview with the ... [child] .... A ... record shall be made of the entire interview. Transcripts thereof shall be provided to counsel and the parties upon request ....

R. 5:8A, Appointment of Counsel for Child.

In all cases where custody or parenting time/ visitation is an issue, the court may ... appoint counsel on behalf of the child or children .... The appointment ... should occur when the trial court concludes that a child's best interest is not being sufficiently protected by the attorneys for the parties ....

R. 5:8B, Appointment of Guardian ad Litem.

Appointment. In all cases in which custody or parenting time/ visitation is an issue, a guardian ad litem may be appointed by court order to represent the best interests of the child or children if the circumstances warrant such an appointment ... The guardian ad litem shall file a written report with the court setting forth findings and recommendations and the basis thereof, and shall be available to testify and shall be subject to cross-examination thereon.

(a) Objection or Refusal of Appointment. A proposed guardian ad litem shall have the right to consent or to decline to serve as such, notice of such decision to be in writing to the court with copies to counsel. The parties shall have the right to object to the person appointed as guardian ad litem on good cause shown.

(b) Term. ....

(c) Fee. The hourly rate to be charged by the guardian ad litem shall be fixed in the initial appointment order and the guardian ad litem shall

submit informational monthly statements to the parties. ....

* * * * *

Official Comment for Rules 5:8A and 5:8B

The purpose of Rules 5:8A and 5:8B is to eliminate the confusion between the role of a court-appointed counsel for a child and that of a court-appointed guardian ad litem (GAL). ....

A ... counsel's services are to the child. Counsel acts as an independent legal advocate ... active part in the hearing ... If the purpose of the appointment is for legal advocacy, then counsel ... appointed.

A ... guardian ad litem services are to the court on behalf of the child. The GAL acts as an independent factfinder, investigator and evaluator... .... If the purpose of the appointment is for independent investigation and factfinding, then a GAL ... appointed.
....

These rules are not intended to expand the circumstances when such appointments are to be made; neither are these appointments to be made routinely.
...[1994]

R. 5:14. Proceedings to Determine Parent-Child Relationship.

5:14-1. Complaint, Parties. The person, official or agency authorized by law shall institute proceedings by a verified complaint. The natural mother, the man presumed by law to be the natural father, anyone whose name appears on the birth certificate and anyone who has attempted to file an acknowledgment of paternity ... shall be made parties to the action. .... The complaint sent to the alleged father shall include a Certificate of Parentage ...

APPENDIX K – FAMILY COURT COMPLAINT

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION – FAMILY PART
MORRIS COUNTY

DOCKET NO. FD-14-000-....

CIVIL ACTION COMPLAINT

O'CALLAGHAN, DANIEL J.
(PUTATIVE FATHER)

VS.
[VRB]
(NAT MOTHER)

(X) PATERNITY
( ) CUSTODY
( ) SUPPORT
(X) VISITATION
( ) MEDICAL SUPPORT

PLA ADDRESS: ... BROOKLYN NY ...

DEF ADDRESS: ... CHESTER NJ ...

THE CHILD(REN) ARE:

NAME	DATE OF BIRTH
[DTB]	06/19/1992

RESIDING AT
CHESTER NJ ...

RESIDING WITH/ RELATIONSHIP
[VRB] NAT MOTHER

FILED

SUPERIOR COURT'OF NEW JERSEY

JUN 22 2000

S/ DEPUTY CLERK

(X) 1. PLAINTIFF SEEKS ADJUDICATIO OF PATERNITY FOR THE CHILD(REN) NAMED ON PAGE 1

( ) 2. PLAINTIFF SEEKS ESTABLISHMENT OF SUPPORT ORDER …

( ) 3. …

( ) 4. PLAINTIFF BELIEVES THAT IN THE BEST INTEREST OF THE CHILD(REN) CUSTODY SHOULD BE GRANTED TO THE PLAINTIFF.

(X) 5. PLAINTIFF SEEKS AN ORDER OF THIS COURT GRANTING/ DENYING REASONABLE RIGHTS OF VISITAITON.

( ) 6….

( ) 7. COMMENTS:

CERTIFICATION …

I CERTIFY THAT THE FOREGOING STATEMENTS MADE BY ME ARE TRUE. I AM AWARE THAT IF ANY OF THE FOREGOING STATEMENTS MADE BY ME ARE WILLFULLY FALSE, I AM SUBJECT TO PUNISHMENT.

S/ 6/22/2000 S/ Daniel J. O'Callaghan

WITNESS DATE PLAINTIFF

(2)

Supreme Court, U.S.
FILED
MAY 12 2005
OFFICE OF THE CLERK

No. 04-992

IN THE

Supreme Court of the United States

D.T.B., a minor child, by his next friend,
DANIEL J. O'CALLAGHAN and
DANIEL J. O'CALLAGHAN, Pro Se,
on his own behalf,

Petitioner,

v.

HON. JOHN J. FARMER, JR. in past or present official capacity as Attorney General of the State of New Jersey; HON. JOHN J. HARPER, in his past or present official capacity as Justice of the Superior Court of New Jersey, Chancery Division, Family Part; ANN T. SCUCCI; MATHIAS R. HAGOVSKY and DAVID F. SALVAGGIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MATHIAS R. HAGOVSKY, Ph.D.

MICHAEL S. SCHWARTZ
HEIM & MCENROE
12 Vreeland Road
P.O. Box 975
Florham Park, NJ 07932
(973) 360-6200

Attorneys for Respondent Mathias R. Hagovsky, Ph.D.

194312

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Third Circuit Court of Appeals erred by upholding the District Court's determination that Respondent Dr. Mathias R. Hagovsky, was immune from liability, as a court appointed psychologist pursuant to *Hughes v. Long*, 242 F.3d 121 (3d Cir. 2001).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

1. APPOINTMENT, SCOPE AND DUTIES OF DR. HAGOVSKY 2

2. DELAY OF COURT ORDERED PSYCHOLOGICAL EVALUATIONS 3

3. RESPONDENT DR. HAGOVSKY DID NOT WAIVE HIS AFFIRMATIVE DEFENSES 6

SUMMARY OF ARGUMENT 6

REASONS FOR DENYING THE PETITION 6

1. THE PETITION IDENTIFIES NO CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OTHER COURT 6

Contents

Page

2. THE THIRD CIRCUIT COURT OF APPEALS' AFFIRMATION OF THE IMMUNITY AFFORDED RESPONDENT IS CORRECT 7

A. THE DISTRICT COURT PROPERLY DETERMINED THAT RESPONDENT DR. HAGOVSKY WAS ENTITLED TO JUDICIAL IMMUNITY PURSUANT TO *HUGHES v. LONG*, 242 F.3d 121 (3D CIR. 2001) 7

B. RESPONDENT DR. HAGOVSKY DID NOT WAIVE THE AFFIRMATIVE DEFENSES AFFORDED TO HIM PURSUANT TO *HUGHES v. LONG*, 242 F.3d 121 (3D CIR. 2001) 10

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

CASES

Brisco v. LaHue, 460 U.S. 325 (1983) 8, 9

Charpentier v. Godsil, 937 F.2d 859 (3rd Cir. 1991) 10, 11, 12

Hughes v. Long, 242 F.3d 121 (3rd Cir. 2001) ....*passim*

Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3rd Cir. 1993) 10, 11, 12

Stump v. Sparkman, 435 U.S. 349 (1978) 8, 9

FEDERAL STATUTES

42 U.S.C. § 1983 8

42 U.S.C. § 1985 8

STATE STATUTES

N.J.S.A. 59:6-5 10

FEDERAL RULES

Fed. R. Civ. P. 8(f) 10

Fed. R. Civ. P. 15(a) 11

STATEMENT OF THE CASE

The genesis of this matter was a paternity, custody and/or visitation action filed by Petitioner Mr. O'Callaghan against V.R.B. in the New Jersey Superior Court, Chancery Division, Family Part, Morris County (hereinafter the "Family Court"). [A 114-115][1]. The matter was assigned to co-Respondent, the Honorable John J. Harper. [A 116]. On or about August 25, 2000, Judge Harper appointed Dr. Hagovsky as a court appointed psychologist who was to perform a psychological evaluation of Petitioners, Mr. O'Callaghan, D.T.B. (Appellant's minor son) and V.R.B. (D.T.B's natural mother). [A179-181].

On February 6, 2001, Petitioners filed a Complaint in the United States District Court, District of New Jersey alleging that Judge Harper and several other individuals had violated Petitioners' civil rights. [A41]. On April 5, 2001, Petitioners filed an Amended Complaint in the United States District Court, District of New Jersey wherein Petitioners alleged that Respondent Dr. Hagovsky violated his constitutional rights. [A52-110]. The Complaint against Judge Harper was dismissed by the District Court by Opinion and Order dated August 9, 2001. [A5-19]. Subsequently, the District Court granted Respondent Dr. Hagovsky's Motion for Summary Judgment by Order entered September 30, 2003 [A32-33; 570-86.].

On September 14, 2004, The United States Court of Appeals for the Third Circuit affirmed the August 9, 2001 and September 30, 2003 Orders of the District Court dismissing Petitioners' Complaint. [Appendix E 21a-23a].

1. "A" refers to the Joint Appendix filed by Defendants-Appellees in the Third Circuit Court of Appeals.

STATEMENT OF FACTS

Petitioner, Mr. O'Callaghan alleges he and his natural son, D.T.B.'s civil rights were violated by the actions of the Respondents, Dr. Mathais R. Hagovsky, the Honorable John J. Farmer, the Honorable John J. Harper, Ann T. Scucci and David F. Salvaggio. [A52-110]. These baseless allegations arise from a paternity, custody and/or visitation action filed by Appellant Mr. O'Callaghan against V.R.B. in the Family Court. [A 114-115].

1. APPOINTMENT, SCOPE AND DUTIES OF DR. HAGOVSKY

The Family Court matter was initially handled by Judge Harper. [A116]. On August 25, 2000, Dr. Hagovsky was appointed by Judge Harper as a court appointed psychologist to perform a psychological evaluation of Petitioner, O'Callaghan, D.T.B. (Petitioner's minor son) and V.R.B. (D.T.B's natural mother). [A179-181]. Dr. Hagovsky's duties were initially set forth in the August 25, 2000 Order. The Order provided in part that:

> 2) the minor child is to see a therapist and parents to meet with therapist and participate and cooperate in all aspects of therapy and with regards to visitation and custody.
>
> 3) therapist appointed is Dr. Mathia [sic] Hagovsky

[A179-181]. These duties were further clarified by Judge Harper in an Order issued on October 27, 2000. [A269-271]. Therein Judge Harper stated the following:

> The psychologist, among any issues he/she deems appropriate, is also to conduct an examination/ investigation including, but not limited to, evaluations of both the parties and the child, addressing parenting time of the child with plaintiff, including overnights, as well as any potential parental alienation.

[A269-271 at ¶9].

2. DELAY OF COURT ORDERED PSYCHOLOGICAL EVALUATIONS

Throughout the Family Court proceedings, Petitioner Mr. O'Callaghan challenged the appointment of Dr. Hagovsky. [A52-110]. On or about August 30, 2000, Mr. O'Callaghan filed an order to show cause seeking, among other things, a temporary stay of the appointments. [A201-203]. As a result, no appointments were scheduled by the parties with Dr. Hagovsky at that time. [A64 ¶51]. On or about September 15, 2000, Mr. O'Callaghan requested that an alternative psychologist be used to perform the evaluation. [A245]. That request was denied by the court. [A245].

In October 2000, Mr. O'Callaghan petitioned the Superior Court of New Jersey Appellate Division and the New Jersey Supreme Court for an interlocutory appeal. Both requests for leave to appeal were denied. [A267-268]. On or about October 19, 2000, Mr. O'Callaghan filed an Order to Show Cause to recuse Judge Harper. [A263-264]. Judge Harper adjourned plaintiff's Order to Show Cause until December 8, 2000. [A72 at ¶85-87].

In early December 2000, an appointment for the evaluations of V.R.B. and D.T.B. were scheduled with Dr. Hagovsky. [A579-581]. Those evaluations took place on December 16, 2000. [A580 at ¶6]. No appointment was ever scheduled for Mr. O'Callaghan. [A580 at ¶7]. Dr. Hagovsky received two letters from Mr. O'Callaghan and left voicemail messages for Mr. O'Callaghan, however, the two never spoke. [A580 at ¶7]. Shortly thereafter, Appellants filed their complaints in the District Court. [A41 and A52].

Petitioners appear to base their violation of civil rights asserted against Dr. Hagovsky on the timeliness of his psychological evaluations of D.T.B. and V.R.B. as well as his inability to evaluate Mr. O'Callaghan. [A52-110]. There is no basis in fact to support the Petitioners' claims or the within appeal.

On February 6, 2001, Judge Harper issued a Letter Decision wherein he summarized the proceedings to date, in part, as follows:

> This Court is satisfied from the plaintiff's [Mr. O'Callaghan] conduct and the defendant's [V.R.B.] certifications that at no time did Mr. O'Callaghan cooperate with this Court's efforts to have . . . a Psychologist assess the parenting abilities of the parties and provide an evaluation . . . The Court appointed qualified professionals to assist it in fact-finding only to have its efforts constantly frustrated by the plaintiff who sought to challenge the appropriateness of the appointments and who resisted cooperating. Incredibly, plaintiff now claims that it was the Court who failed to see to it

> that the professionals had completed their assignments in a timely fashion. The plaintiff apparently fails to comprehend the inconsistency of his position and seeks only to blame the Court instead of himself for the failure of the professionals to complete their assignments. It is evident that Mr. O'Callaghan is seeking to delay and frustrate the Court's efforts to gather facts about this matter through legal maneuvering and challenges. There is no other reasonable or appropriate explanation.
>
> Plaintiff's arguments are circular. He seeks to point to everyone else as the cause of the delay. I daresay, if he had cooperated, met with Ms. Succi, and allowed her to complete her work, we would have had her report by now. The same is true for Dr. Hagovsky. It becomes evident that the plaintiff is obsessed with legal challenges and cannot see that if he would only allow the Court appointed professionals to do their work and submit to this fact-finding effort, the Court then would be in the position to address the issue about which he complains, namely, whether the child has been traumatized, and if so, by whom. He blames the Court for the delay which he has occasioned.

[A424-439 at p. 4-5].

It is clear from the record that any cause in delay or inability to fulfill Dr. Hagovsky's duties as a court appointed psychologist rest with Mr. O'Callaghan.

3. RESPONDENT DR. HAGOVSKY DID NOT WAIVE HIS AFFIRMATIVE DEFENSES

Dr. Hagovsky is entitled to immunity pursuant to *Hughes v. Long*, 242 F.3d 121 (3d Cir. 2001). This affirmative defense was pled in Dr. Hagovsky's Answer to the Amended Complaint. [A482-495]. Specifically, Dr. Hagovsky's Seventeenth Affirmative Defense states as follows: "The conduct of this defendant, was justified under the circumstances, and was **privileged** and based on reasonable and probable cause." [Emphasis added]. [A482-495].

SUMMARY OF ARGUMENT

For the reasons set forth in the argument, which follows, Respondent respectfully requests that this court uphold the Third Circuit Court of Appeals' affirmation of the District Court's entry of summary judgment in favor of Respondent Dr. Hagovsky because the District Court properly concluded that Dr. Hagovsky was entitled to immunity, as a court appointed psychologist, pursuant to *Hughes v. Long*, 242 F.3d 121 (3d Cir. 2001).

REASONS FOR DENYING THE PETITION

1. THE PETITION IDENTIFIES NO CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OTHER COURT

At the time of the alleged wrongdoing, Respondent, Dr. Hagovsky was acting as a court appointed psychologist. Accordingly, he enjoyed judicial immunity because he acted as an arm of the court. *See Hughes v. Long*, 242 F.3d 121 (3d Cir. 2001). Petitioner has identified no U.S. Circuit Court

nor any state court of last resort which disputes this immunity. Nor has Petitioner cited any decision of this Court which conflicts with the holding of *Hughes v. Long* [citation omitted]. Therefore, Respondent respectfully requests the Court deny Petitioner's writ.

2. THE THIRD CIRCUIT COURT OF APPEALS' AFFIRMATION OF THE IMMUNITY AFFORDED RESPONDENT IS CORRECT

A. THE DISTRICT COURT PROPERLY DETERMINED THAT RESPONDENT DR. HAGOVSKY WAS ENTITLED TO JUDICIAL IMMUNITY PURSUANT TO *HUGHES v. LONG*, 242 F.3d. 121 (3d Cir. 2001)

The District Court properly granted Dr. Hagovsky's Summary Judgment Motion as he was immune from liability pursuant to the Third Circuit Court of Appeals' ruling in *Hughes v. Long*, 242 F.3d. 121 (3d Cir. 2001). In *Hughes*, the Third Circuit Court of Appeals held that a court–appointed psychologist enjoyed judicial immunity because he acts as an "arm of the Court". *See Hughes*, 242 F.3d at 127-28, 131. The Third Circuit Court of Appeals reasoned that a court appointed psychologist is a non-judicial person who fulfills a quasi judicial role at the court's request. *Id.* As such, they act at the court's request for the court's benefit. *Id.*

In *Hughes*, *supra*, Pamela Hughes had filed a petition for temporary custody of her children against her former spouse, Peter Hughes. As in this present case, the state court had jurisdiction over the child custody proceeding. *Id.* The state court, in response to the custody petition, ordered

the parties to undergo an evaluation by defendant Long, a licensed clinical social worker. Based upon that evaluation, the court ordered Pamela and Peter Hughes to participate in psychological evaluations. *Id.* In that regard, defendant Long referred the Hughes' to defendants Lacy and McHugh who were court appointed psychologists. The psychologists conducted psychological testing of Peter and Pamela Hughes and reported their findings to the court. *Id.*

Peter Hughes, similar to Mr. O'Callaghan, disagreed with the evaluation and claimed fraudulent behavior by Long, Lacy and McHugh. Hughes then filed a federal court action alleging that his civil rights under 42 U.S.C. § 1983 and § 1985 were violated by the defendants. *Id.* at 123-24.

The Complaint was dismissed by the District Court finding that the defendants were entitled to qualified immunity. *Id.* Plaintiff, Peter Hughes appealed. In response, the Third Circuit Court of Appeals held that the trial judge's dismissal was right but for the wrong reason. *Id.* The Third Circuit Court of Appeals held that a court appointed psychologist is entitled to absolute judicial immunity from civil rights suits involving the judicial process. *See Hughes, supra*, 242 F.3d. at 127-28, 131. This immunity gives functionaries of the judicial system the ability to perform their tasks and apply their discretion without threat of retaliatory § 1983 litigation. *See Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). Based upon this immunity, witnesses including public officials and private citizens are immune from civil damages based upon their testimony. *See Brisco v. LaHue*, 460 U.S. 325, 341, 345-46 (1983).

The Third Circuit Court of Appeals reasoned that psychologists are afforded absolute judicial immunity

because they are non-judicial persons who fill a quasi-judicial role at the court's request. *Hughes*, *supra*, 242 F.3d at 127-28. The Third Circuit Court of Appeals further reasoned that court appointed experts in custody evaluation cases are acting as an "arm of the Court" in areas where the court had no expertise. *See Hughes*, *supra*, at 124.

In the present case, Respondent Dr. Hagovsky, similar to Defendants Long and McHugh in the *Hughes* case, was a court appointed psychologist. Dr. Hagovsky was appointed by the Honorable John J. Harper, J.S.C., to conduct an examination of the parties and report to the court in connection with the custody hearing. [A179-181 and A269-271]. As a result, Dr. Hagovsky is entitled to absolute judicial immunity because he was functioning as an arm of the court in a quasi-judicial role at the request of the court.

In light of the foregoing, Respondent Dr. Hagovsky is entitled to judicial immunity. As discussed, judicial immunity is absolute. *See Brisco*, *supra* at 345-46 and *Stump*, *supra*, at 356-57. Therefore, as a matter of law, Dr. Hagovsky was entitled to judicial immunity for any and all action undertaken by him in connection with his duties as a court appointed psychologist in the Family Court proceedings. Accordingly, the District Court properly granted Dr. Hagovsky's Motion for Summary Judgment.

B. RESPONDENT DR. HAGOVSKY DID NOT WAIVE THE AFFIRMATIVE DEFENSES AFFORDED TO HIM PURSUANT TO *HUGHES v. LONG*, 242 F.3d 121 (3RD CIR. 2001).

As set forth in Respondent's Argument, Dr. Hagovsky is entitled to immunity pursuant to *Hughes v. Long*, 242 F.3d. 121 (3d Cir. 2001). This affirmative defense was pled in Dr. Hagovsky's Answer to the Amended Complaint. [A482-495]. Specifically, Dr. Hagovsky's Seventeenth Affirmative Defense stated as follows: "the conduct of this defendant, was justified under the circumstances, and was **privileged** and based on reasonable and probable cause." [Emphasis added]. [A482-495, 493 at ¶17].

Privilege is defined as an "immunity held by a person or class, not generally possessed by others." *See*, BLACK'S LAW DICTIONARY 1197 (3d Ed. 1990). By pleading in his Answer that his conduct was privileged, Dr. Hagovsky asserted the affirmative defense of judicial immunity accorded him by *Hughes*. The foregoing is consistent with the intent of Federal Rule of Civil Procedure 8(f) which provides that "all pleadings shall be construed as to do substantial justice." Fed. R. Civ. P. 8(f).

The issue of waiver of an affirmative defense was addressed by the Third Circuit Court of Appeals in the matters of *Charpentier v. Godsil*, 937 F.2d 859 (3d Cir. 1991) and *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993). In *Charpentier*, the Appellant alleged that an Respondent/physician had waived the affirmative defense of immunity afforded the physician under the New Jersey Tort Claims Act, N.J.S.A. 59:6-5 (hereinafter the "TCA"). *See Charpentier*, 937 F.2d at 863. There the physician did

not raise the defense until he joined a trial brief submitted by a co-defendant who had pled the immunity afforded under the TCA. *See id.* The Third Circuit Court of Appeals commented that the "failure to raise an affirmative defense by responsive pleading or appropriate motion does not always result in waiver." *See id.* [citation omitted]. The Third Circuit Court of Appeals noted that:

> Under Fed.R.Civ.P. 15(a), a responsive pleading may be amended at any time by leave of court to include an affirmative defense, and "leave shall be freely given when justice so requires." Unless the opposing party will be prejudiced, leave to amend should generally be allowed.

See id. at 864-865 [citation omitted].

Moreover, an affirmative defense is not waived if raised by the defendant at a pragmatically sufficient time, provided the plaintiff is not prejudiced. *See id.* at 865 [citations omitted]. The Third Circuit Court of Appeals concluded that the defendant/physician had not waived the immunity afforded under the TCA because the plaintiff was alerted to these defenses by the pleadings of the other defendants. *See id.*

In *Kleinknecht*, the defendant failed to raise the affirmative defense of immunity under Pennsylvania's Good Samaritan law in its responsive pleading. *See id.* 989 F.2d at 1373. The defendant raised this defense for the first time when it filed a summary judgment motion. *See id.* Relying upon *Charpentier*, the Third Circuit Court of Appeals held that the defendant did not waive the affirmative defense as it was raised in the Summary Judgment motion and there was no allegation of prejudice. *See id.* at 1374.

If the Court is inclined not to accept Respondent's assertion that the immunity afforded under *Hughes* was pled in Dr. Hagovsky's Seventeenth Affirmative Defense, Respondent respectfully asserts that the defense was preserved pursuant to *Kleinknecht* and *Charpentier.* As in those cases, the immunity afforded under *Hughes* was raised at a pragmatic time and without prejudice to the Appellants. Clearly, if this matter were remanded to the District Court, the District Court would have adequate authority to grant Dr. Hagovsky leave to amend his responsive pleading to assert this affirmative defense.

In light of the foregoing, Respondent Dr. Hagovsky did not waive the affirmative defense of judicial immunity afforded him under *Hughes*.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the Petition for Certiorari should be denied

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
MAY 18 2005
OFFICE OF THE CLERK

No. 04-992

In the
Supreme Court of the United States

D.T.B., a minor child, by his next friend, DANIEL J. O'CALLAGHAN, and DANIEL J. O'CALLAGHAN, *Pro Se*, on his own behalf,

Petitioners,

v.

HON. JOHN J. FARMER, JR., in past or present official capacity as Attorney General of the State of New Jersey; HON. JOHN J. HARPER, in his past or present official capacity, as Justice of the Superior Court of New Jersey, Chancery Division, Family Part; ANN T. SCUCCI; MATHIAS R. HAGOVSKY; and DAVID F. SALVAGGIO,

Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether the court of appeals properly applied the Rooker-Feldman doctrine in affirming the dismissal of this action for declaratory and injunctive relief as to the State respondents whereby petitioners sought to have the federal district court overturn, as constitutionally invalid, final orders issued by respondent Judge Harper?

Whether subject matter jurisdiction is lacking as to the claims for retrospective declaratory and injunctive relief asserted against the State respondents by reason of Eleventh Amendment immunity?

Whether the declaratory and injunctive relief sought as to the State respondents in this action has been rendered moot by the intervening State appellate court ruling?

Whether certiorari should be denied as dismissal of the amended complaint for declaratory and injunctive relief filed against the State respondents would have been warranted pursuant to the Younger v. Harris abstention argument advanced before the federal district court?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iv

COUNTERSTATEMENT OF THE CASE.....1

ARGUMENT

POINT I

THE WRIT SHOULD BE DENIED AS THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY APPLIED THE ROOKER-FELDMAN DOCTRINE TO PETITIONERS' FEDERAL SUIT SEEKING TO OVERTURN THE FINAL STATE COURT RULINGS ENTERED BY RESPONDENT JUDGE HARPER.....16

POINT II

PURSUANT TO THE ELEVENTH AMENDMENT, THE FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION TO ADJUDICATE THE CLAIMS FOR RETROSPECTIVE DECLARATORY AND INJUNCTIVE RELIEF AS TO THE STATE RESPONDENTS.....19

POINT III

DISMISSAL OF THE FEDERAL COMPLAINT SEEKING INJUNCTIVE AND DECLARATORY RELIEF AS TO JUDGE HARPER AND ATTORNEY GENERAL FARMER WOULD HAVE BEEN WARRANTED, AS ARGUED BELOW, UNDER YOUNGER V. HARRIS, 401 U.S. 37 (1971), ABSTENTION PRINCIPLES.....22

POINT IV

THE PETITION FOR CERTIORARI SHOULD BE DENIED AS THE CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF AS TO THE STATE RESPONDENTS ARE MOOT.....28

CONCLUSION.....30

APPENDIX

A. Opinion of the Superior Court of New Jersey, Appellate Division, Docket No. A-289-02T3, dated July 1, 2003.....1a

B. Opinion of the Superior Court of New Jersey, Appellate Division, Docket Nos. A-4782-00T3 and A-6659-00T3, dated October 29, 2002.....20a

TABLE OF AUTHORITIES
CASES CITED

Ankenbrandt v. Richards, 504 U.S. 689 (1992).....27

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997).....29

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).....14,16,18

Edelman v. Jordon, 415 U.S. 651 (1974).....19

Elk Grove Unified School District v. Newdow, 542 U.S. 1, 124 S.Ct. 2301 (2004).....26,27

Ex Parte Young, 209 U.S. 123 (1908).....20,21

Exxon Mobil Corporation v. Saudi Basic Industries Corp.,544 U.S. ____, 125 S.Ct. 1517 (2005).....16,17,18

Fitts v. McGee, 172 U.S. 516 (1899).....21

Green v. Mansour, 474 U.S. 64 (1985).....21,29

Hafer v. Melo, 502 U.S. 21 (1991).....20

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).....23,24,25

Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261 (1997).....21

Kentucky v. Graham, 473 U.S. 159 (1985).....20

Kinsella v. Kinsella, 150 N.J. 276, 696 A.2d 556 (1997).....28

Maisonet v. Dept. of Human Services, 140 N.J. 214, 657 A.2d 1209 (1995).....27

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).....23

Moore v. Sims, 442 U.S. 415 (1979).....26

New Orleans Public Service v. New Orleans, 491 U.S. 350 (1989).....24

Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001).....21

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).....22

Papasan v. Allain, 478 U.S. 265 (1986).....20

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984).....20

Pennzoil v. Texaco, 481 U.S. 1 (1987).....22,25,26

Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996)..23

Rooker-Feldman Trust Co., 263 U.S. 413 (1923).....13,14,16,17,18,19

Stern v. Nix, 840 F.2d 208 (3d Cir.), cert. denied., 488 U.S. 826 (1980).....18

Thigpen v. Roberts, 468 U.S. 27 (1984).....22

Verizon Md. Inc. v. Public Service Comm'n of Md., 535 U.S. 635 (2002).....21

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989).....20

Wooley v. Maynard, 430 U.S. 705 (1977).....28

Younger v. Harris, 401 U.S. 37 (1971)...18,22,24,26,27,28

STATUTES CITED

N.J.S.A. 9:17-38 et seq.....28

N.J.S.A. 9:17-39.....1

N.J.S.A. 9:17-40.....1

42 U.S.C. §1983.....27

42 U.S.C. §1988.....27

RULES AND REGULATIONS CITED

N.J. Ct. R. 2:2-5(b).....9,17

N.J. Ct. R.5:1.....11

N.J. Ct. R.5:1-4.....14,28

N.J. Ct. R.5:3.....12

N.J. Ct. R.5:3-3.....11,14

N.J. Ct. R.5:8-1.....11,14

N.J.Ct. R.5:8B.....11

Fed.R.Civ.Proc. 12(b)(1).....13

Fed.R.Civ.Proc. 12(b)(6).....13

COUNTERSTATEMENT OF THE CASE

This petition for a writ of certiorari arises from a September 14, 2004, decision by the United States Court of Appeals for the Third Circuit affirming the District Court of New Jersey's dismissal of an amended complaint of petitioner Daniel J. O'Callaghan, individually and on behalf of his son, D.T.B., a minor, seeking declaratory and injunctive relief against former New Jersey Attorney General John J. Farmer, Jr. and Superior Court of New Jersey, Chancery Division-Family Part Judge John J. Harper on the basis of the Rooker - Feldman doctrine. As determined by the lower federal courts, petitioners' federal constitutional challenge to visitation and other rulings rendered by Judge Harper as to D.T.B. and other claims inextricably tied to these challenges were not cognizable by the federal district court but rather were appropriate for state appellate review then pending.

Mr. O'Callaghan is the natural father of twelve-year-old D.T.B. (A139).[1] On June 22, 2000, Mr. O'Callaghan, then residing in Brooklyn, New York, filed suit against V.J.B., the natural mother of D.T.B., a resident of Chester, New Jersey, in the Superior Court of New Jersey, Chancery Division-Family Part, Morris County, seeking an adjudication establishing his paternity of D.T.B. and reasonable visitation with the child, pursuant to N.J.S.A. 9:17-39,40 (Appendix K to the Petition for Certiorari) (hereinafter, App. K). On June 23, 2000, Mr. O'Callaghan's then counsel filed a motion seeking, inter alia, temporary custody of D.T.B. or, in the alternative, a liberal parenting-time schedule with him (A117). Following a hearing conducted by Judge Harper on July 28, 2000, the court issued an order, inter alia, continuing custody of D.T.B. with his mother, requiring that the parties undergo a best interest investigation and home inspection with

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[1] A __ refers to the appendix filed by Mr. O'Callaghan with the United States Court of Appeals for the Third Circuit.

which they were to "fully cooperate" and directing that D.T.B. be interviewed by the court on August 10 in connection with the best interest investigation (A121; A122). On or about August 15, 2000, Mr. O'Callaghan filed a substitution of attorney, noting his appearance pro se (A123), and on August 18, 2000, sought emergent relief, alleging Ms. B.'s refusal to provide him with agreed upon parenting time (A124 to A147).[2] Pending consideration of the applications by Judge Harper, Judge Christine L. Miniman entered an order on August 18, 2000, directing that Mr. O'Callaghan be afforded overnight, continuous parenting time with D.T.B. between August 18 and 22, 2000 (A156 to A158).

Following hearings on August 22 and 25, 2000, and relying on submissions by D.T.B.'s mother, Judge Harper entered an order which suspended all overnight visitation between Mr. O'Callaghan and his son (A159 to A161; A168 to A170) but directed that visitation occur following the court proceeding and thereafter, during the day on August 26, 2000, from 10:00 a.m. to 6:00 p.m. at Mr. O'Callaghan's home and on August 29, 2000, from 3:00 p.m. to 7:00 p.m. in New York City (A179 to A181). Additionally, the court appointed Ann T. Scucci as guardian ad litem to interview the parties and child and make recommendations to the court and Dr. Mathias R. Hagovsky, a psychologist, to provide therapy to D.T.B., with the parents participating in the therapy. The court continued the matter until September 15, 2000 (A181).

Mr. O'Callaghan thereafter sought an emergent stay of the order appointing a guardian ad litem and therapist and restoration of his overnight parenting time (A182 to A196;

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[2] According to a certification filed by Mr. O'Callaghan, his then counsel had advised him that Judge Harper had authorized D.T.B.'s overnight visit with his father for the weekend of August 12 and 13 (A124). As Judge Harper would later note in his February 6, 2001, letter decision, he had initially found based on the record at that point that overnight visits would be appropriate (A426).

A201 to A203) and following the September 8, 2000, return date, Judge Harper continued the appointments of Ms. Scucci and Dr. Hagovsky and provided for further daytime parenting time for Mr. O'Callaghan pending further hearing on September 15, 2000 (A219 to A220). Following additional submissions by Mr. O'Callaghan (A221 to A243) and the conduct of the September 15th hearing, Mr. O'Callaghan unsuccessfully sought an emergent order seeking recusal of Judge Harper and custody of D.T.B. (A263 to A264).[3]

By order entered October 27, 2000, Judge Harper memorialized his findings and rulings as to the September 15, 2000, hearing and thereby directed that the appointment of the guardian ad litem would continue and that if the parties could agree, a psychologist participating in V.J.B.'s insurance plan could be substituted for Dr. Hagovsky. (A269 to A271).

In response to an emergent Order to Show Cause filed by Mr. O'Callaghan, the court subsequently directed in October and November, 2000, orders that, pending the reports of the guardian ad litem and psychologist, overnight visits by D.T.B. with Mr. O'Callaghan would not proceed, but that Saturday visits between 10:00 a.m. and 6:00 p.m. would continue (A270; A274; A277). Judge Harper further directed the court-appointed psychologist to conduct "evaluations of both parties and the child, addressing parenting time of the child with [Mr. O'Callaghan], including overnights, as well as potential parental alienation[;]" (A278).

In his November 15th order Judge Harper explained:

> 3. Pending further Order of the Court, and receipt of reports from both the Court appointed *guardian ad*

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[3] In October, 2000, petitioner unsuccessfully moved for emergent relief before the Superior Court of New Jersey, Appellate Division asserting "clear error and violation of the Constitutional safeguards as to orders entered in August and October, 2000" (A266 to A268).

> *litem* and psychologist, overnight visitation of Plaintiff with the minor child will not occur. There is much high conflict between these parties which has so seriously impacted the child as discussed in the certifications filed by the parties and others, and these parties are so litigious and apparently incapable of recognizing what is in the best interests of their son without the intervention of a *guardian ad litem* and psychologist that it is necessary to appoint a *guardian ad litem* and a psychologist to bring this matter to an appropriate resolution.
>
> 4. Unfortunately, the Court's effort to bring such assistance to the parties is misperceived by the Plaintiff as an effort toward delay and not recognized as needed under the circumstances. Limited visitation will continue until the Court receives an impartial assessment and an accurate account of what is in the child's best interest. There is no irreparable harm as Plaintiff claims.
> [A277; emphasis added].

Following a rescheduling of the November 17, 2000, hearing for December 8 due to a second motion filed by Ms. B. which was not properly served (A278; A281) and Mr. O'Callaghan's application for reconsideration of the adjournment, Judge Harper issued findings of fact and conclusions, reiterating that the suspension of overnight visitation continued "because of conflicts between the parties and the impact same is having upon the child as evidenced by certifications filed with the court . . ." (A280). The court further opined as to Mr. O'Callaghan's application for recusal of the judge that:

> This is a 'high conflict case' which now threatens, if not properly managed, to engulf defendant's counsel and the Court in efforts to divert attention from the best interests of D[ ] to plaintiff's claims of

> prejudicial and unfair treatment by those who disagree with him. His efforts to have this Court recuse itself are obviously designed to seek another judge who will make rulings more favorable to plaintiff's position. As discussed below there is no basis for recusal and this Court will not reward the plaintiff's efforts to forum shop. Plaintiff must cooperate with the guardian ad litem and the psychologist, continue with his visitation as ordered and reduce the level of conflict. To do otherwise, is not in the best interests of D[ ].
> [Ibid.].[4]

Following further submissions by Mr. O'Callaghan as to the application for recusal (A282 to A292; A293 to A294), the submission of a preliminary report of the guardian ad litem following a visit with D.T.B. at his mother's home (A296 to A298), and a hearing conducted on December 8, 2000, Judge Harper entered an order on December 13, 2000, denying the motion for recusal, granting the motion to find Ms. B. in violation of litigant's rights and further ordering additional visits between D.T.B. and Mr. O'Callaghan in New York and New Jersey (A235). The court further directed that the parties "cooperate with the guardian ad litem and court-appointed psychologist to allow expeditious completion of their reports" (A336).[5] In the accompanying findings of fact, the court reiterated its view that the appointments of the guardian ad litem and psychologist were

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[4] The Appellate Division subsequently denied Mr. O'Callaghan's motion for leave to appeal and stay this order (A295).

[5] In her initial report, Scucci had indicated that she had been unsuccessful in her attempts to communicate with Mr. O'Callaghan to arrange for a visit at his home with D.T.B. (A297). By letter dated December 13, 2000, Judge Harper requested that Scucci contact Mr. O'Callaghan again and directed Mr. O'Callaghan to communicate with her (A331).

necessary to help the court determine D.T.B.'s best interests given the "high degree of conflict" between the parents (A237 to A238).

Following the filing of an Order to Show Cause by Mr. O'Callaghan on December 16, 2000, asserting violation of his constitutional rights by entry of the court's orders, as well as additional submissions (A344 to A364; A365 to A374; A375; A379 to A380; A381 to A388; A389 to A394), Mr. O'Callaghan sought, inter alia, recusal of Judge Harper, disqualification of V.J.B.'s counsel, the guardian ad litem and Dr. Hagovsky, immediate institution of overnight visitation, and vacating of all prior orders, (A389 to A394; A397 to A399). Subsequent to a February 2, 2001, hearing before Judge Harper, the court denied the motions for reconsideration and disqualification and further ordered Mr. O'Callaghan's payment of V.J.B.'s counsel fees (A421 to A42). Directing that the complaint for custody and/or visitation be dismissed, the court further ordered that Mr. O'Callaghan's daytime Saturday visits continue and that Ms. Scucci and Dr. Hagovsky were relieved of their duties with any continuing efforts to be on a voluntary basis. (A421 to A422). In an accompanying letter decision dated February 6, 2001, the court addressed each of the issues addressed in Mr. O'Callaghan's submissions, noting:

> This Court is satisfied from the plaintiff's conduct and the defendant's certifications that at no time did Mr. O'Callaghan cooperate with this Court's efforts to have the Guardian ad Litem discharge her duties, and further, to have a Psychologist assess the parenting abilities of the parties and provide an evaluation. The plaintiff has some mistaken notion that the Court should enforce its own orders sua sponte. The Court has responded appropriately in this case to the requests of the parties for its intervention. The Court appointed qualified professionals to assist it in fact-finding only to have

> its efforts constantly frustrated by the plaintiff who sought to challenge the appropriateness of the appointments and who resisted cooperating. Incredibly, plaintiff now claims that it was the Court who failed to see to it that the professionals had completed their assignments in a timely fashion. The plaintiff apparently fails to comprehend the inconsistency of his position and seeks only to blame the Court instead of himself for the failure of the professionals to complete their assignments. It is evident that Mr. O'Callaghan is seeking to delay and frustrate the Court's efforts to gather facts about this matter through legal maneuvering and challenges. There is no other reasonable or appropriate explanation.
> [A427; emphasis supplied].[6]

Mr. O'Callaghan thereupon filed a motion for leave to appeal with the Appellate Division on February 16, 2001 (A440 to A441). By order of the Appellate Division entered on April 16, 2001 (A464), the court determined that the challenged February 6, 2001, order was a final order, appealable as of right. Mr. O'Callaghan was thus directed to file a Notice of Appeal, which he did on or about April 19, 2001, challenging both the February 6 and March 26, 2001, orders entered by Judge Harper. (A471). Mr. O'Callaghan subsequently filed a separate appeal as to the June 28, 2001,

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[6] Judge Harper subsequently adjudicated additional motions presented by Mr. O'Callaghan (A442 to A455) with regard to his child support obligations and payment of counsel fees by order entered March 26, 2001 (A456; A457 to A458). Cross-motions by the parents were also addressed by Judge Harper in an order entered on June 28, 2001. See Appendix B to the State Respondents' Brief Opposing Certiorari (hereinafter RApp.B at 57a to 59a).

order, which later was consolidated with the earlier appeal (RApp.B at 63a to 64a).[7]

By unpublished opinion issued on October 29, 2002, the Appellate Division affirmed the Family Part orders entered on February 6, March 26, and June 28, 2001, "substantially for the reasons articulated by Judge Harper in his comprehensive written opinions accompanying each order." (RApp.B at 65a).[8] The court also specifically found that "[t]he case management efforts undertaken by Judge Harper were designed to provide the court with sufficient information to evaluate plaintiff's claim for custody, and to determine a custodial and parenting-time arrangement that met the best interest of D[ ]. Plaintiff's efforts frustrated that effort and resulted in the court's dismissal of plaintiff's claim." Id. at 68a to 69a. Nevertheless, the Appellate Division directed that a remand hearing be conducted by the Family Part as to the "issue of whether overnight parenting-time sessions between D[ ] and his father are in D[ ]'s best interest and, if so, the nature and frequency of same." Id. at 69a. The appellate panel further noted "that the overnight parenting-time issue should be expeditiously managed and adjudicated through imposition of tight time frames. Although full cooperation by

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[7] In a brief filed with the Appellate Division in February, 2002, challenging each of Judge Harper's orders, Mr. O'Callaghan asserted that the Family Court's "unfair extinguishment of 'overnight' visitation not only has been injurious to the minor child (and . . . his father but also has violated procedural rules and compelling New Jersey case law and has been accomplished in violation of constitutional safeguards. See generally, Ankenbrandt v. Richards, 504 U.S. 689 (1992). See Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); Shapiro v. Thompson, 394 U.S. 618 (1969)" (Plaintiff's pro se Brief, Docket No. 006659-00T3 at p.7).

[8] A redacted copy of this opinion as well as of the ensuing July 20, 2003, Appellate Division opinion as to D.T.B. have been included in the State respondents' appendix as references to the minor and his mother in this federal litigation have been by initials only.

both parties obviously serves the interest of their own respective positions, evaluations necessary to determine this issue can be accomplished with or without parental cooperation." Id. at 70a. No further appeal to the Supreme Court of New Jersey, as permitted by N.J. Ct. R. 2:2-5(b), appears to have been filed.[9]

In the interim, one day after issuance of Judge Harper's February 6, 2001, order, Mr. O'Callaghan filed a complaint in the United States District Court for the District of New Jersey (A41) and on April 6, 2001, an amended complaint, then also on behalf of his son (A40 to A41; A52 to A110), naming Judge Harper and Attorney General Farmer, in their official capacities only, as well as the guardian ad litem, Ann T. Scucci, Dr. Hagovsky, and V.T.B.'s counsel David F.

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[9] Contrary to petitioners' claims (Pet. at 17) and as the cited rule makes clear, a judgment of the Appellate Division on appeal from "a final judgment shall be reviewable by the Supreme Court on certification or, when appropriate, as of right, notwithstanding the remand of the matter by the Appellate Division for further proceedings." Thus, Mr. O'Callaghan could have sought review of the October 29, 2002, appellate ruling.

In any event, following the Appellate Division's October 29, 2002, remand, proceedings continued before Family Part Judge David Rand. Following a hearing on July 2, 2002, the court entered an order providing, in pertinent part, for overnight visitation by Mr. O'Callaghan with D.T.B. from July 3 at 11:00 a.m. to July 7 at 12:00 p.m. and for vacation after July 20 (RApp.A at 12a). Following additional hearings, the court entered orders providing for further vacation/overnight visitation by Mr. O'Callaghan with D.T.B. (Id. at 13a to 15a). As revealed in the Appellate Division's July 1, 2003, opinion arising from this custody dispute, additional Family Court hearings regarding visitation schedules continued into 2003.(Id. at 16a).

Salvaggio as defendants.[10] By his amended complaint, Mr. O'Callaghan alleged violation of his and his son's federal rights of privacy, access to the courts, the privilege and immunities clause (Article IV §2, Clause 1) as well as the First, Fifth, Seventh, Ninth and Fourteenth Amendments arising from the June, 11, 2000, to March, 22, 2001, proceedings before Judge Harper (A52 to A91).[11] As the first

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[10] As asserted in the State's motion to dismiss, nowhere in the amended complaint is there any reference to any actions taken by Attorney General Farmer with regard to either Mr. O'Callaghan or D.T.B. in the proceedings initiated by Mr. O'Callaghan before Judge Harper. Nor is there any explanation for why this executive branch officer is referred to as a "Judicial Defendant" (A92) or has been sued with regard to the application of Court Rules promulgated by the Supreme Court of New Jersey.

[11] Following a detailed, thirty-one page recitation of the proceedings before the Family Court from commencement of the action on June 22, 2000, through the entry of the March 26, 2001, order (A55 to A86), paragraph 150 of the amended complaint summarizes the constitutional challenges asserted:

> In so acting, Judge Harper violated DTB's and Plaintiff *Pro Se*'s due process and equal protection rights, *i.e.*, planned and intended not an arbitrary misapplication of State law, but rather, a consistent avoidance and omission of enforcement of State statutory law and rules and customary Family Court practices and procedures so as to preclude to DTB and to Plaintiff *Pro Se* the rights to (i) parent-child relationship; (ii) association including companionship, society, affection and comfort between the minor child and natural father, (iii) the equal application of resources of the State Track System, and (iv) Plaintiff *Pro Se*'s ability to have commenced-and pursued - - the claims, *i.e.*, effective visitation and custody.
> [A87; emphasis in original].

(continued...)

and second claim for relief, Mr. O'Callaghan sought a declaratory judgment that Judge Harper and Attorney General Farmer's actions violated federal constitutional rights "as identified in the aforesaid facts and circumstances alleged" as "relating to the identified hearings and Family Court orders and Findings and the Letter Decision and the $10,000 Order and related practices/procedures conducted pursuant to the above Rules and in consequence of the conduct of the Judicial Defendants . . ." (A94) and that N.J. Ct. R.5:8B (Appointment of guardian ad litem), N.J. Ct. R.5.1 (Case management Track Rules), N.J. Ct. R.5:3-3 (Appointment of Experts) and N.J. Ct. R.5:8-1 (custody of children) were unequally applied to unmarried fathers or were otherwise vague and unconstitutional (A92 to A94; A100).

Asserting a "biased Family Court judge, unconstitutional Family Court practices/procedures and statutes" (A94) as well as discriminatory treatment (A96), Mr. O'Callaghan also sought in the third and final, fourth claim for relief as to the State respondents an order:

> (i) enjoining enforcement of all orders, findings, decisions, and judgments, including the Letter Decision and the $10,000 Order, issued in the Family Court case;
>
> (ii) directing reinstatement of the Plaintiff *Pro Se's* Family Court complaint including claims for effective visitation and custody;
>
> (iii) directing a fair and impartial Visitation Rights Hearing and

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[11](...continued)
See also A88 to A91.

custody trial in compliance with the State's Track System with implemented constitutional safeguards which include enjoining as "volunteers" Scucci and Hagovsky;

(iv) directing transfer of the case to a fair and impartial Family Court judicial official and the imposition of reasonable right of access to courts standards;

(v) directing that the all proceedings and the record in the Family Court case commenced upon parentage be made confidential and sealed pursuant to Ch. 9:17-42 and R.5:3 in the best interests of the minor child grounded upon the First Amendment and Right to Privacy.

[A95 to A96].

See also A97.[12]

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[12] Four additional complaints were subsequently filed by Mr. O'Callaghan with regard to the preceedings as to D.T.B:

1. A suit later consolidated with the amended complaint filed against Attorney General Farmer and Judge Harper, naming Ms. Scucci, Mr. Hagovsky and Mr. Salvaggio as defendants (C.A. No. 01-4032) (A496 to A516);

2. A complaint naming, among others, then Attorney General Samson, Judge Harper, and Judge David B. Rand, who handled subsequent proceedings in the D.T.B. custody litigation, as defendants (C.A. No. 2002-CV-5791;

(continued...)

On March 19, 2001, the New Jersey Attorney General moved, pursuant to Fed.R.Civ.Proc. 12(b)(1) and (6), to dismiss the complaint filed against Judge Harper and Attorney General Farmer (A48 to A51) on the grounds of lack of subject matter jurisdiction by reason of the Rooker-Feldman doctrine and also urged that the District Court should abstain on Younger v. Harris, Pullman and/or Burford abstention grounds. (App. A at 1-2; 7-8).[13]

In an opinion dated August 9, 2001, the District Court determined that it lacked subject matter jurisdiction to hear the case under the Rooker-Feldman doctrine as the federal court challenge was essentially an attempt "to seek federal court review of the Family Court decision" which appeal was already pending before the Superior Court of New Jersey, Appellate Division (App.A at 13). As noted by the court, "district courts must evaluate whether the relief requested by the complainant would void the state court's rulings. Accordingly, a complaint which essentially appeals a final state court decision must be dismissed for lack of subject

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[12](...continued)

3. A complaint naming as defendants, among others, the Advisory Committee on Judicial Conduct with whom Mr. O'Callaghan filed a complaint as to Judge Harper (C.A. No. 2002-CV-5791); and

4 A complaint naming Attorney General Harvey, Appellate Division Judge Rodriguez, Judge Rand, among others, as defendants (C.A. No. 2003-CV-4419).

Only the last filed action remains pending.

[13] The motion further urged dismissal of the complaint as to Attorney General Farmer as the complaint failed to state a claim against him upon which relief could be granted and further argued that the complaint should be dismissed for failure to demonstrate entitlement to injunctive relief.

matter jurisdiction." (Id. at 9-10). The court thereupon concluded that to grant injunctive relief in this case based "on the multitude of . . . constitutional rights [allegedly] violated by Judge Harper in his family court proceedings" would effectively reverse the state court judgment, contrary to Rooker-Feldman. (Id.at 10-11).

As to the remaining claims asserting that New Jersey Court Rules 5:1-4, 5:3-3 and 5:8-1 were unconstitutional, the court noted its need to assess, under District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483 n.16 (1983), whether these claims "were inextricably intertwined ith the state court's [decision] in a judicial proceeding", thus requiring the court "in essence being called upon to review the State court decision". (Id. at 8). While recognizing that Mr. O'Callaghan purported to assert a facial challenge to these court rules, the district court found significant that the injunctive relief requested were the court to find any of the three rules unconstitutional was limited to "enjoin[ing] enforcement of all orders, findings, decisions, and judgments, including the letter decision and the ten-thousand ($10,000) order, issued in the Family Court case." (Id. at 12). Accordingly, the court construed the facial constitutional challenges as "nothing more than an attempt to have this Court reverse a state court decision." (Id. at 12-13). Thus, by order entered that same day, the court dismissed the complaint with prejudice as to Judge Harper and Attorney General Farmer (App. B). By Amended Order dated December 17, 2001, the court clarified that its earlier order contemplated dismissal of the claims set forth in the Amended Complaint (App. C).[14]

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[14] By order dated September 26, 2003, the District Court also dismissed the complaint as to Dr. Hagovsky on Rooker-Feldman grounds as well as based on its finding that as a court-appointed psychologist Dr. Hagovsky was absolutely immune from liability (App. D). On appeal, the United States Court of Appeals for the Third Circuit affirmed the District

(continued...)

By per curiam opinion issued on September 14, 2004, the United States Court of Appeals for the Third Circuit affirmed the District Court's conclusions as to the applicability of the Rooker-Feldman doctrine, noting:

> We appreciate the importance of O'Callaghan's concerns, but the claims asserted in the present federal action are inextricably interwined with the state court decisions, and the lower federal courts accordingly lack jurisdiction to entertain those claims.
> [App. E at 22].

By order entered on October 20, 2004, the Court of Appeals denied the petition for rehearing (App. G).

This petition for certiorari followed.

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[14](...continued)
Court's grant of summary judgment in favor of Dr. Hagovsky on the grounds of absolute immunity (App. E).

ARGUMENT

POINT I

THE WRIT SHOULD BE DENIED AS THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY APPLIED THE ROOKER-FELDMAN DOCTRINE TO PETITIONERS' FEDERAL SUIT SEEKING TO OVERTURN THE FINAL STATE COURT RULINGS ENTERED BY RESPONDENT JUDGE HARPER.

In Rooker-Feldman Trust Co., 263 U.S. 413 (1923), the Court established that an unsuccessful state court litigant is barred by federal statutory law from challenging the correctness of a state court judgment on federal constitutional grounds in the district court. "To do so would be an exercise of appellate jurisdiction," which only the Supreme Court of the United States may exercise. Id. at 416.

Again, in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) and this Term, in Exxon Mobil Corporation v. Saudi Basic Industries Corp.,544 U.S. ____, 125 S.Ct. 1517 (2005), the Court reaffirmed that federal court review of a state court judgment may not be obtained in the lower federal courts. As the Exxon Mobil Court emphasized, the Rooker-Feldman doctrine "is confined to cases . . . brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." 125 S.Ct. at 1521-22.

This is precisely the case presented here. Thus, one day after Judge Harper issued his February 6, 2001, order dismissing Mr. O'Callaghan's complaint for custody and denying his motion for reconsideration as to his parenting-

time schedule, Mr. O'Callaghan filed his initial complaint in the federal district court challenging, as violative of his and his son's constitutional rights, rulings entered by Judge Harper over the course of the then eight-month Family Court proceedings. In addition to seeking a declaratory judgment finding Judge Harper's rulings to have violated numerous constitutional rights, Mr. O'Callaghan sought injunctive relief barring enforcement of all orders, findings and judgments issued by the Family Court, as well as reinstatment of the Family Court complaint and a direction for a further hearing as to the visitation issues before a different Family Part judge (App.A. at 7).

Plainly, each of the elements described in Exxon Mobil's clarification of the Rooker-Feldman doctrine were satisfied: the loser in the concluded State court proceedings complains of injuries caused by the State court ruling, preceding the federal filing, and "invit[es] district court review and rejection of these judgments." 125 S.Ct. at 1522.[15] As in Rooker, Mr. O'Callaghan "repaired to federal court to undo

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[15] Contrary to petitioner's contentions (Pet. at 15), the February 6, 2001, order entered by Judge Harper (as well as the subsequent March 26, 2001 and June 28, 2001 orders) were viewed by the Appellate Division as final orders, resulting in the court's issuance of the October 29, 2002, opinion addressing the merits of Judge Harper's various rulings (R.App.B). Moreover, insofar as the court in the October 29, 2002, opinion determined a need for further hearings before the Family Court on the visitation issue, the court's remand, by operation of N.J. Ct. R.2:2-5(b), did not render either the appellate ruling or the trial court rulings challenged interlocutory. As N.J. Ct. R.2:2-5(b) recognizes, an appeal may be taken to the Supreme Court of New Jersey from an Appellate Division order for remand so long as the original trial court rulings challenged were final.

the [State court] judgment . . .", 125 S.Ct. at 1527, and declare it "null and void." Rooker, supra, 263 U.S. at 414.[16]

And consistent with the Court's teachings in District of Columbia Court of Appeals v. Feldman, supra, 460 U.S. at 487 n.18, the lower courts upon a "close reading" of the amended complaint properly focused on the ultimate injunctive relief requested in determining that the essential relief sought from the district court was to review and overturn the rulings embodied in Judge Harper's February 6, 2001 order. See e.g., Stern v. Nix, 840 F.2d 208 (3d Cir.), cert. denied, 488 U.S. 826 (1980). As the courts below properly concluded, the amended complaint's assertions as to the invalidity of certain New Jersey court rules allegedly violated in the context of the Family Court proceedings before Judge Harper were "inextricably intertwined" with the challenges to the February 6, 2001, rulings. Id. at 486. Moreover, as made clear by the ultimate injunctive relief

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[16] In contrast, in Exxon Mobil, the federal plaintiff did not commence its action seeking to annul a state court judgment. Rather, as detailed by the Court, the federal action was filed by Exxon Mobil as a pre-emptive action prior to any state court adjudication, 125 S.Ct. at 1525.

Since Exxon's federal court challenge sought a determination as to whether Saudi Basic Industries Corporation had overcharged Exxon Mobil's joint ventures for sublicenses, rather than seeking to overturn an existing state court judgment, the later adjudication of the state suit did not, as the Court of Appeals concluded, deprive the lower federal courts of jurisdiction. While the existence of the state court judgment might warrant dismissal in whole or part of the federal case on claim or issue preclusion grounds or deferral to the state proceedings on Younger v. Harris, 401 U.S. 37 (1971) or other abstention grounds, "neither Rooker nor Feldman supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains sub judice in a federal court." Exxon Mobil, supra, 125 S.Ct. at 1527.

requested (no less than the essential focus of and the parties named in the amended complaint), the objective of the federal suit was to overturn and render null and void the findings and orders entered by Judge Harper as of February 6, 2001. As such, the courts below properly concluded that the relief requested as to the State respondents would run afoul of the Rooker-Feldman doctrine.

As the rulings below are consistent with the teachings of this Court as to the limited scope of the Rooker-Feldman doctrine and as no conflict or other compelling reason warrants review of this matter, certiorari should be denied.

POINT II

PURSUANT TO THE ELEVENTH AMENDMENT, THE FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION TO ADJUDICATE THE CLAIMS FOR RETROSPECTIVE DECLARATORY AND INJUNCTIVE RELIEF AS TO THE STATE RESPONDENTS.[17]

The Eleventh Amendment of the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state.

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[17] Although the Eleventh Amendment argument was not raised or addressed below, this Court has repeatedly emphasized its obligation to examine its jurisdiction as well as the jurisdiction of the courts below. Edelman v. Jordan, 415 U.S. 651, 677-78 (1974).

This amendment gives "affirmation to traditional notions of state sovereign immunity and also bars actions by private citizens against not only the State but also state agencies, regardless of the relief sought." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1984). The law is clear that unless a State has consented to such litigation or Congress has expressly abrogated the State's Eleventh Amendment immunity, claims brought in federal court against a State or its agencies by private citizens are barred by the Eleventh Amendment. Papasan v. Allain, 478 U.S. 265, 276 (1986); Pennhurst, supra, 465 U.S. at 100. "This bar exists whether the relief sought is legal or equitable." Papasan, supra, 478 U.S. at 276. In addition, this Court has consistently held that, under the Eleventh Amendment, suits against state officials in their official capacities are no different than suits against the State itself, and are barred. Hafer v. Melo, 502 U.S. 21 (1991); Will v. Michigan Dept. of State Police, 491 U.S. 58, 66, 71 (1989); Kentucky v. Graham, 473 U.S. 159, 165-166 (1985).

In the present case, Mr. O'Callaghan has sued, in their official capacities only, Judge Harper, who presided over the challenged Family Part proceedings from June, 2000, through March, 2001, as well as former Attorney General Farmer, who had no role in these proceedings Because the State of New Jersey has not consented to lawsuits against its judiciary and executive branch members, and because Congress has not abrogated the States' Eleventh Amendment immunity in civil rights suits such as this, the Eleventh Amendment bars the claims asserted as to Judge Harper and Attorney General Farmer in their official capacities. Therefore, the Court lacks jurisdiction under the Eleventh Amendment to review this matter.

The fact that the petitioners are seeking only declaratory and injunctive relief as to the State respondents does not deprive these state officials of the benefit of Eleventh Amendment immunity. As the Court has emphasized, the Ex

Parte Young, 209 U.S. 123 (1908), fiction only applies where the requested relief is prospective, and not retrospective, in nature. Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261, 294 (1997). See also Verizon Md. Inc. v. Public Service Comm'n of Md., 535 U.S. 635, 645-48 (2002).

In the present case, petitioners are seeking retrospective relief in the form of a declaration that their constitutional rights were violated in the past by the rulings of Judge Harper. This is retrospective relief for an alleged wrong by a public official rather than prospective relief against state officials. See Green v. Mansour, 474 U.S. 64, 68 (1985). Additionally, insofar as Attorney General Farmer played no role in the challenged Family Court proceedings nor in the adoption or enforcement of the challenged court rules, the limited exception carved out by Ex Parte Young does not apply and Eleventh Amendment immunity obtains for this reason as well. See Fitts v. McGee, 172 U.S. 516, 529-30 (1899). Compare with Ex parte Young, supra, 209 U.S. at 156. See also Okpalobi v. Foster, 244 F.3d 405, 412-419 (5th Cir. 2001).

Accordingly, the claims for declaratory and injunctive relief brought as to the State respondents are barred under the Eleventh Amendment. Therefore, the petition for certiorari should be denied on this basis alone.

POINT III

DISMISSAL OF THE FEDERAL COMPLAINT SEEKING INJUNCTIVE AND DECLARATORY RELIEF AS TO JUDGE HARPER AND ATTORNEY GENERAL FARMER WOULD HAVE BEEN WARRANTED, AS ARGUED BELOW, UNDER YOUNGER V. HARRIS, 401 U.S. 37 (1971), ABSTENTION PRINCIPLES.[18]

In its long line of abstention decisions beginning with Younger v. Harris, 401 U.S. 37 (1971), this Court has articulated a strong public policy against interference with ongoing state proceedings by federal courts. The Younger Court identified two primary reasons for federal courts to abstain where there are pending State proceedings. One is the basic equitable principle that courts of equity should not act, particularly to restrain State judicial processes, when the affected party has an adequate remedy at law and will not suffer irreparable harm by denial of the equitable relief. Id. at 45. The second, more critical consideration, is the notion of federalism or comity. As further developed in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986), and Pennzoil v. Texaco, 481 U.S. 1 (1987), the Younger abstention doctrine instructs that absent extraordinary circumstances justifying intrusion, federal courts should refrain from taking any action in cases where the federal plaintiff has adequate redress available in State court proceedings.

Although Younger involved State court criminal proceedings and a request for federal injunctive relief, the Court has extended the doctrine to the civil context (where

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[18] This Court can dispose of the petition for certiorari on any ground raised below and therefore is not limited to the single rationale for dismissal of the claims upheld by the lower courts. See Thigpen v. Roberts, 468 U.S. 27, 29-30 (1984).

both federal injunctive and declaratory relief are sought) when the following three requirements are satisfied: (1) there is an ongoing state proceeding which is judicial in nature; (2) the proceeding implicates important state interests; and (3) there will be an opportunity at same stage of the proceeding to raise constitutional challenges. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). See also Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

In Huffman v. Pursue, Ltd, supra the federal plaintiff had never appealed from the grant of a permanent injunction against him in the Allen County Court of Common Pleas. As detailed by the Court:

> As a matter of state procedure, the judgment presumably became final, in the sense of being nonappealable, at some point after the District Court filing, ... [But] regardless of when the Court of Common Pleas' judgment became final, we believe that a necessary concomitant of Younger is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in Younger.
> [Id. at 608; emphasis added]

The Huffman Court expressed the important interests that are served by this deference to the state appellate process

> Virtually all of the evils at which Younger is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial. Intervention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state

> appellate courts. Nor, in these state-initiated nuisance proceedings, is federal intervention at the appellate stage any the less a disruption of the State's efforts to protect interests which it deems important. Indeed, it is likely to be even more disruptive and offensive because the State has already won a nisi prius determination that its valid policies are being violated in a fashion which justifies judicial abatement.
> [Id. at 608-09; emphasis added]

For these reasons the Court concluded that it did not matter for Younger purposes whether the federal plaintiff had availed himself of the state appellate option: "In any event, [the plaintiff] may not avoid the standards of Younger by simply failing to comply with the procedures of perfecting its appeal." Id. at 611 n. 22.

More recently in New Orleans Public Service v. New Orleans, 491 U.S. 350, 368-369 (1989), the Court again voiced similar sentiments:

> For Younger purposes, the State's trial-and appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign. For the same reason, a party may not procure federal intervention by terminating the state judicial process prematurely ...
> [emphasis supplied]

In this case, the District Court properly could have dismissed the claims asserted as to the State respondents under Younger abstention principles. As this Court in Huffman recognized, Younger abstention principles seek to avoid "federal intervention which would annul the results of [a State court or] agency determination," and deprive the States of the legitimate and proper function of resolving

constitutional issues "in litigation over which they had jurisdiction." 420 U.S. at 609. This point was earlier highlighted in Wooley v. Maynard, 430 U.S. 705, 711 (1977). There, in declining to find error in the District Court's refusal to abstain, the Court noted:

> Here ... the suit is in no way 'designed to annul the results of a State trial' since the relief requested sought is wholly prospective, to preclude future prosecution under a statute alleged to violate appellees' constitutional rights. Maynard has already sustained convictions and has served a sentence of imprisonment for his prior offenses. He does not seek to have his record expunged, nor to annul any collateral effects those convictions may have, e.g. upon his driving privileges. The Maynards seek only to be free from prosecutions for future violations of the same statutes.
> [emphasis supplied]

However, in this case, petitioners seek precisely the relief the Maynard Court sought to distinguish. Thus, the amended complaint requests a declaratory ruling as to the "unconstitutionality of the [New Jersey Court] Rules relating to the identified hearings and Family Court orders and Findings and the [February 6, 2001] Letter Decision and the $10,000 Order and related practices/procedures conducted pursuant to the above Rules . . ." (A94). As well, petitioners seek an order "enjoining enforcement" of all of Judge Harper's orders issued in the Family Court case as well as reinstatement of the June, 2000 complaint for "effective visitation and custody". (A95; A97; A101).

Clearly such claims for relief, insofar as it would render the final determinations of the Family Court a nullity, fall directly within the Wooley v. Maynard proscription and thus should not be properly entertained by the federal courts. See Pennzoil Co. v. Texaco, Inc., supra, 481 U.S. at 13-14

(federal action to enjoin enforcement of State court judgment and to declare Texas bond and lien provisions violative of due process by arbitrarily depriving Texaco of right to appeal dismissed on Younger abstention grounds to avoid federal granting of relief which would make State court's judgments "nugatory").

Moreover, in the present case, as in Pennzoil, all three preconditions for Younger abstention were satisfied. Within two weeks of the date the amended complaint was filed in federal court, Mr. O'Callaghan had filed his first appeal as of right in the State appellate court from Judge Harper's February 6 and March 26, 2001 orders - - the very orders challenged in this action. Thus, there is no question as to the existence of an on-going proceeding in State court with respect to the custody case that forms the basis of the constitutional claims before the federal court. This satisfies the first of the Younger abstention requirements.

Nor can there be any doubt as to satisfaction of the second Younger factor - - that the pending state proceeding implicated important state interests. The federal courts have repeatedly recognized that child custody issues reflect important state interests and that state courts have an important interest in matters involving divorce, alimony, child custody and spousal and child support. See Elk Grove Unified School District v. Newdow, 542 U.S. 1, 124 S.Ct. 2301, 2309 (2004); Moore v. Sims, 442 U.S. 415, 434-35

(1979).[19] Accordingly, the second Younger requirement was satisfied.

Finally, the state appeal process which Mr. O'Callaghan pursued afforded the opportunity to raise (as he had below) his federal constitutional claims. Under the New Jersey Court Rules, litigants who disagree with the findings of a trial court have a right to appeal that decision to the Appellate Division of the state and further to the New Jersey Supreme Court if the Appellate Division decision is not acceptable. Moreover, it is clear that the state appellate proceedings offer ample opportunity to present constitutional claims. Thus, the Supreme Court of New Jersey in Maisonet v. Dept. of Human Services, 140 N.J. 214, 657 A.2d 1209 (1995), ruled that in an appeal from a State administrative decision the appellant could include claims under 42 U.S.C. §§1983 and 1988 directly related to the challenge to the agency action. Thereafter, the Appellate Division could either decide the federal claims in the exercise of its original jurisdiction or transfer those claims to the Law Division. 140 N.J. at 226-227. No lesser ability obtained as to the appeal from the Family Court orders. Thus, as is evident in Mr. O'Callaghan's Appellate Division appeal brief, he was free to raise anew both state law and federal constitutional challenges to the rulings rendered by Judge Harper.[20]

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[19] Indeed, given the preeminent role of the State courts and federal court deference to State law in this area it might have been appropriate for the district court to have declined jurisdiction under the "domestic relations exception" even though the relief requested did not seek issuance directly by the federal court of a child custody decree. See Ankenbrandt v. Richards, 504 U.S. 689, 703, 705-6 (1992) But see Elk Grove Unified School District v. Newdow, supra, 124 S.Ct. at 2313-14 (concurring opinion of Chief Justice Rehnquist).

[20] Here, review by the state appellate courts eliminated many of the state law issues undergirding the constitutional claims, which

(continued...)

Because all of the requirements needed for application of the Younger abstention were present in this case, and as no compelling equitable basis for federal court intervention was presented, the courts below appropriately should have abstained from hearing this matter. Thus denial of the petition for certiorari is warranted on this basis as well.

POINT IV

THE PETITION FOR CERTIORARI SHOULD BE DENIED AS THE CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF AS TO THE STATE RESPONDENTS ARE MOOT.

Insofar as the essential relief sought by the amended complaint filed in April, 2001, as to the State respondents was for an order directing reinstatement of Mr. O'Callaghan's Family Court complaint for effective visitation and custody of his son, and a hearing before a judge of the Family Part (other than Judge Harper) as to visitation rights, that relief was accorded by reason of the intervening Appellate Division ruling of October 29, 2002. Although the appellate panel rejected the multitude of arguments advanced by Mr. O'Callaghan as to the invalidity of Judge Harper's February, March and June, 2001, orders, the court did remand the case for further hearings as to the issue of overnight visitation between D.T.B. and his father (RApp.B at 69a to 70a). As revealed in the subsequent July 1, 2003, Appellate Division opinion, those hearings proceeded before the Family Part (and

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[20](...continued)
petitioners continue to advance before this Court, see Pet. at 2 and n.1, 7 n.5, 16,17,19,20,21,23 as to the Parentage Act, N.J.S.A. 9:17-38 et seq, application of N.J. Ct. R.5:1-4 and the family therapist privilege as explored in Kinsella v. Kinsella, 150 N.J. 276, 696 A.2d 556 (1997). See R.App.B at 65a to 69a.

before a judge other than Judge Harper) (RApp.A at 7a to 15a). Additionally, Mr. O'Callaghan had the opportunity in his state appeal to present his claims as to the unconstitutional application of the court rules challenged in this litigation and the further opportunity to seek review of those claims before the Supreme Court of New Jersey, and thereafter this Court. He, however, chose not to do so.

As the rulings by Judge Harper challenged in this litigation have been effectively resolved by the intervening Appellate Division ruling, no live controversy exists as to the essential relief sought in this litigation. See Arizonans for Official English v. Arizona, 520 U.S. 43, 67-68 and n.23 (1997). See also Green v. Mansour, supra, 474 U.S. at 72-73 (equitable considerations militate against issuance of declaratory relief where dispute concerns repealed law). For this reason as well, the petition for certiorari should be denied.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 18, 2005

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-289-02T3

DANIEL O'CALLAGHAN,

Plaintiff-Respondent/
Cross-Appellant,

v.

V J B,

Defendant-Appellant/
Cross-Respondent.

Argued: May 21, 2003 - Decided: July 1, 2003

Before Judges Fall and Weissbard.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket Number FD-14-581-00.

Catherine F. Riordan argued the cause for appellant/ cross-respondent (Einhorn, Harris, Ascher, Barbarito, Frost & Ironson, attorneys; Bonnie C. Frost and Ms. Riordan, on the brief).

Daniel J. O'Callaghan, respondent/cross-appellant, argued the cause pro se.

PER CURIAM

On leave granted, defendant V J B appeals from those portions of an order entered in the Family Part on August 30, 2002, vesting joint legal custody of the child D with both parties, and barring her from enrolling D in the American Boychoir School in Princeton. Plaintiff Daniel J. O'Callaghan cross-appeals, contending the Family Part erred by failing to grant all relief sought by him in his numerous applications to the court since June 2002.

The procedural history of this Family Part case was outlined in detail in our unpublished opinion decided October 29, 2002, and need not be recounted here. See O'Callaghan v. B, A-4782-00T3 and A-6659-00T3 (Oct. 29, 2002). In that opinion, we affirmed orders entered in the Family Part on February 6, 2001, March 26, 2001, and June 28, 2001, "substantially for the reasons articulated by Judge Harper in his comprehensive written opinions accompanying each order." Id. at 41-42.

At the time we issued our October 29, 2002 opinion, we noted the following:

> At argument, plaintiff informed this court that subsequent to the June 28, 2001 order, additional proceedings have been conducted in the Family Part pertaining to an application by defendant for permission to enroll D in the American Boychoir School located in Princeton, and that there was a pending appeal concerning an order entered in the Family Part on August 30, 2002, regarding various issues.

Upon contacting the Clerk's Office, we have determined that another appeal is presently pending in this court, docketed as A-289-02T3, from an order entered in the Family Part on August 30, 2002 by Judge David B. Rand. That order prohibited the enrollment of D in the American Boychoir School; directed that D be enrolled in the Chester school system for the 2002-2003 school year; provided for the parties to share joint legal custody of D; required D to receive immediate therapeutic counseling at the parties' shared cost; and re-instated plaintiff's parenting time with D with Chester library as the pick-up and drop-off point.

On September 10, 2002, an order was entered in this court, granting defendant's motion for leave to appeal from the August 30, 2002 order, and entering a stay of the August 30, 2002 order, pending appeal. That order stated it was this court's intent to permit defendant to enroll D in the American Boychoir School as a day student for the 2002-2003 school term.

[Id. at 40-41.]

Upon affirming the February 6, 2001, March 26, 2001, and June 28, 2001 orders, we remanded the matter to the Family Part

> on the issue of whether overnight parenting-time sessions between D and his father are in D's best interest and, if so, the nature and frequency of same. We do not view the stay granted in the September 10, 2002 order entered in A-289-02T3 as preventing the Family Part from determining an appropriate parenting plan for D with his father. We leave the case management of that issue including,

> but not limited to, whether appointment of a guardian ad litem and/or mental health professional, are necessary to reach those determinations, to the discretion of the Family Part. We hasten to add, however, that the overnight parenting-time issue should be expeditiously managed and adjudicated through imposition of tight time frames. Although full cooperation by both parties obviously serves the interest of their own respective positions, evaluations necessary to determine this issue can be accomplished with or without parental cooperation.
>
> [Id. at 47-48.]

The issues in this appeal began to emerge in April 2002, when plaintiff became aware of defendant's plans to enroll D in the American Boychoir School--located in Princeton--as a residential student, beginning in September 2002. The American Boychoir School describes itself, inter alia, as a nonsectarian boarding choir school "dedicated to providing musically talented boys, 9 to 14, with a professional training program as well as a challenging traditional academic program."

The record on appeal reflects that defendant began the application procedure for D's admission to that school in January 2002, but did not notify or involve plaintiff in the selection or decision process. Upon discovering that defendant intended to enroll D in that school--at her cost and expense-- plaintiff presented an application to the Family Part in the form of a proposed order to show cause, which was entered by the court on April 29, 2002, requiring defendant to show cause on May 14, 2002, why she should not be directed to withdraw D's application for admission to the American Boychoir School; why temporary sole custody of D should not be vested with plaintiff; why defendant's

counsel, David F. Salvaggio should not be disqualified from representation of defendant; and why all parenting-time exchanges of D should not occur at a location other than the Chester residence of defendant.

The issue of D's attendance at a boarding school was not a new one. Defendant had previously expressed her intention to enroll D in the St. Thomas Choir School in New York for the 2001-2002 school year, the same school then being attended by defendant's other son, A. In its February 2, 2001 order, the Family Part had denied plaintiff's application to prevent that enrollment. In that portion of his February 6, 2001 letter opinion dealing with the St. Thomas Choir School issue, Judge Harper stated, in pertinent part:

> [T]he Court intends to address the remaining issues of most immediate need. The first would be the application to have defendant withdraw her request for admission of the child to St. Thomas Choir School for the 2001 - 2002 academic year and the plaintiff's request to enjoin her from submitting any further applications or enrolling the child in the boarding school for any other year pending further order of the court. The Court is satisfied that the failure of these parties to agree on a matter so important as the further education of the child, is indicative again of their inability to agree on parenting matters and difference in parenting styles. The persistence of the plaintiff to have things his way is demonstrated by the defendant in her certifications on exchange of the child for visitation and as regards other discussions between the parties concerning the welfare of the child. This conduct clearly evidences a lack of cooperation and discord such that the defendant should be the sole party to make

these determinations and to have custody of D. To have joint legal custody apply, the parties must be able to cooperate and engage meaningfully in discussions regarding parenting issues. See N.J.S.A. 9:2-4(c). New Jersey case law clearly requires this as a fundamental predicate of joint legal custody. See Beck v. Beck, 86 N.J. 480, 498 (1981); Brzozowski v. Brzozowski, 265 N.J. Super. 141, 144 (Ch. Div. 1993). The conduct of the parties as evidenced through certifications in this proceeding and especially the conduct of the plaintiff, clearly indicate to this Court that joint legal custody is totally inappropriate. The defendant right now, is the more appropriate parent to have physical custody, and in fact, is the more appropriate parent to be the sole decision maker regarding D's welfare. Of the two parents, she appears to be better grounded in terms of her emotional stability, parenting skills and better able to carry forward what is needed for D. Her choice of a boarding school for D under the circumstances, as she has explained in her papers before this Court, appears well made, especially in view of the current living arrangements between plaintiff residing and working in New York and the defendant residing in Chester, New Jersey, but working in New York City. If D were to attend the boarding school in New York City, it would be easier for the plaintiff to access his son for visitation and daily contact would be facilitated. D, according to the Guardian ad Litem, is favorably disposed toward the boarding school. The defendant's older son already attends that school. Thus, there would be the ability, if D enrolled, for D to have

> access to his older half-brother. There would also be at least a greater opportunity for plaintiff to have closer contact with his son, which he states is frustrated by his inability to speak to his son through telephonic communication, as claimed in his certification. The frequent contact of the parties with New York and D's desire to attend the boarding school can be accommodated by D attending the school and regular parenting contacts with D by both parents. The quality of education provided by the boarding school and the opportunities for D's educational growth and development appear to be good at St. Thomas.
>
> Accordingly, I am denying the request of the plaintiff to have the defendant enjoined and approving the enrollment of D at the St. Thomas Choir School should the defendant seek to do so for the forthcoming academic year, or any subsequent years.

In her opposing certification dated May 9, 2002, defendant contended that plaintiff threatened administrative personnel at the St. Thomas Choir School to the extent that D was not offered admission. Defendant admitted she did not inform plaintiff of the opportunity to enroll D in the American Boychoir School because of her fear that plaintiff would also attempt to sabotage that enrollment. Additional papers were filed by each party.

On May 16, 2002, an order was entered in the Family Part by Judge Rand, directing defendant not to enroll D in the America Boychoir School or summer camp until further order. The order provided for an interview of D by the judge on June 6, 2002, and further stated:

> Pending further order of the court, the current visitation arrangement shall remain in full force and effect. By May 24, 2002, Mr. O'Callaghan shall provide the court with a revised certification on his new home and a revised plan for parenting time with reply by counsel for Ms. B by May 31, 2002. Mr. O'Callaghan shall have parenting time for Memorial Day Weekend through the Monday of that weekend.

In his May 24, 2002 certification, plaintiff explained that he had relocated his residence from Brooklyn, New York, to Bangor, Pennsylvania. Plaintiff stated the move was initiated in February 2002 and completed as of May 22, 2002. He contended that Bangor provided an appropriate atmosphere for D to reside approximately forty-percent of the time, and further outlined a proposed parenting-time schedule. Defendant also submitted a parenting plan.[1] Plaintiff also filed a certification dated June 5, 2002, objecting to D being interviewed by the court, and objecting to consideration of a parenting plan submitted by defendant.[2]

On June 6, 2002, the judge conducted an interview of D and then entered an order that stated, in pertinent part:

> For this upcoming weekend, and until further order, Mr. O'Callaghan may have an additional overnight into Monday morning when he will return the child to school in Chester Monday morning. Wednesdays 7 PM

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[1] Defendant's parenting plan has not been made a part of the record on appeal; we note its existence because plaintiff references it in his June 5, 2002 certification.

[2] The May 16, 2002 order required defendant to reply to plaintiff's proposed parenting plan by May 31, 2002.

to 7:30 PM the child shall be available for phone contact with his father. If this is not possible, Ms. B shall contact Mr. O'Callaghan to reschedule. The issue of the American Boychoir School is reserved. Ms. B shall communicate via cell phone first and may try the home phone if the cell number does not work. Mr. O'Callaghan's phone number at home shall be held in confidence by Ms. B, not to be given to another party.

On June 14, 2002, the judge placed his decision on the record concerning the American Boychoir School issue stating, in pertinent part:

> The interview with D revealed a very alert, intelligent, and perceptive young man. He appears to be quite well adjusted, loves both his mother and father, and obviously feels somewhat torn because of the ongoing litigation that exists between the parties. He's quite aware of it.
>
> * * * *
>
> I'm looking for the best interest of the child in the context of the issue before me and that was, very specifically, should he be enrolled in the boarding school program at the . . . Princeton Boychoir School.
>
> * * * *
>
> During the course of the proceeding, [defendant] indicated . . . that she was so in favor of the child enrolling at the Princeton School, she would literally be willing to

relocate her residence to the Princeton area so as to allow [D] to attend the school on a day basis.

* * * *

During the course of my interview with D, he clearly indicated to me that he wished to attend the school, but he had certain, I will characterize it, concerns about being separated from his mother. He himself indicated the desire that she be close by. In other words, that he not be separated from her during the evenings.

I believe his perception is extraordinary and I believe his insight is extraordinary for a child of his age. I also believe that given the totality of the circumstances, it is not appropriate for the court to allow D to be separated from his family in a boarding school environment for anything near what is proposed by the defendant[.] . . .

* * * *

As a consequence, the court will allow the enrollment. However, only on the condition that [defendant] relocate her residence to a place within a 30-minute drive of the American Boychoir School, Princeton, New Jersey. If she wished to enroll him there, she will be able to do that, but only on a day school basis.

The court observes that it is not reasonable for . . . D to be required to commute from Chester to Princeton every day,

> back and forth. It is just too far. It is at least an hour, possibly longer. It's too long, both in terms of time and distance.

An order memorializing that decision was entered on June 14, 2002.

On June 24, 2002, plaintiff made another application to the court, again using the order to show cause procedure. The court entered an order to show cause on that date, requiring defendant to show cause on July 2, 2002, why the court should not grant plaintiff various relief, including vacating the June 14, 2002 order, placing the child in plaintiff's custody, disqualifying defendant's counsel, requiring defendant to comply with prior orders by taking steps to amend D's birth certificate to name plaintiff as the child's father, and requiring the production of various records. The order specified that it contained no temporary relief, and directed defendant to file a response to plaintiff's requests by June 28, 2002. In his supporting certification, also dated June 24, 2002, plaintiff noted, among other things, that his residence in Bangor, Pennsylvania was forty miles from D's residence in Chester, and that the commute from Bangor to the American Boychoir School in Princeton was eighty miles, as well as being a difficult drive, which would limit or preclude his parenting time with D.

Defendant submitted a certification dated June 28, 2002, disputing the various arguments made by plaintiff, and contending that plaintiff had moved to Bangor and that his law office in New York was closed. Defendant also sought permission to transport D daily to the American Boychoir School from her home in Chester.

On July 2, 2002, the court conducted a hearing[3] and entered an order stating, in pertinent part:

> Ms. B shall inform the court by July 31 if she is moving to the Princeton area to enroll the child in school and the plans for enrollment.
>
> Mr. O'Callaghan may have visitation with the child from July 3 at 11 AM to July 7 at 12 PM.
>
> The parties shall confer by July 12 to get the necessary paperwork to amend the New York birth certificate to include Mr. O'Callaghan as the father.
>
> Mr. O'Callaghan shall provide the court with the block of time he wishes for vacation with the child, after July 20, by July 12[.] . . .
>
> All further relief in the order to show cause is denied without prejudice.
>
> Relist for first week of August.

Plaintiff submitted a further certification to the court dated July 2, 2002, complaining, inter alia, about the results of the July 2, 2002 hearing and characterizing the June 14, 2002 order as "bizarre, unusual, and unprecedented[,]" and that it "validates the alienation C regrettably, promoted by the Family Court through two (2) years of illegal termination/severance."

Additional information was submitted to the court by each party, and the court conducted another hearing on

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[3] A copy of the transcript of the July 2, 2002 hearing has not been made a part of the record on appeal.

August 6, 2002.[4] The court entered an order on that date, requiring defendant to submit to the court, and serve upon plaintiff, proof of a lease for defendant's proposed residence in Ringoes, New Jersey, concerning the American Boychoir School issue. The order also provided, as follows:

> Mr. O'Callaghan may have vacation/visitation time with the child Friday, August 9, 2002 through Friday, August 30, 2002. Exchanges shall be at the Chester Diner, Route 206, Chester, N.J. at 11 AM on both dates.
>
> The parties shall submit to a parenting coordinator, to be appointed by the court, who shall meet with them and develop a parenting plan for the balance of the school year. They shall cooperate with that person's mission.

On August 9, 2002, plaintiff made another application to the court by use of an order to show cause, which was entered by the court on that date, returnable August 15, 2002, directing defendant to show cause why the court should not determine that defendant's proposed residence was not within a thirty-minute drive as required by the June 14, 2002 order; grant plaintiff sole custody; grant plaintiff an evidentiary hearing on custody; provide plaintiff reasonable parenting time; require that the New York birth certificate be amended; and recuse Judge Rand from all further proceedings.

In his moving certification dated August 8, 2002, plaintiff stated that defendant's proposed residence in Ringoes was in excess of fifty miles from the American Boychoir School, which would not comply with the June 14, 2002

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[4] The record on appeal does not contain a transcript of the August 6, 2002 hearing.

order. Plaintiff also contended, inter alia, that Judge Rand's conduct "demonstrates bias and injudicious conduct particularly in unfair efforts to intimidate this Plaintiff *Pro se* father."

By letter to the court dated August 9, 2002, counsel for defendant advised that the scheduled parenting-time exchange on that date at the Chester Diner had not occurred due to an incident in the parking lot of the diner where the child refused to go with plaintiff. By letter to the court dated August 14, 2002, counsel for plaintiff transmitted a copy of a lease agreement between defendant and Paul F. Whiter for the month-to-month rental of premises in Lawrenceville, as an alternative to the Ringoes residence.

On August 9, 2002, the court entered an order appointing Dr. Lee Monday "to evaluate the issues of parenting time between the parties and implement the visitation previously ordered by the Court for holidays, vacations, and the like." The order required both parties to fully cooperate with Dr. Monday, and to equally share the cost of the evaluation.

Plaintiff filed a certification dated August 15, 2002, outlining the problems encountered on August 9, 2002, during the attempted parenting-time exchange, and addressing the various issues raised by the order to show cause. On August 15, 2002, the court conducted another hearing.[5] Although plaintiff was present, neither defendant nor her counsel appeared. The court entered an order on that date, barring defendant from enrolling D in the American Boychoir School pending further order; required defendant to bring D to the court for a possible interview; and scheduled another hearing for August 23, 2002.

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[5] A transcript of the August 15, 2002 hearing is not contained in the record on appeal.

Both parties appeared on August 23, 2003,[6] and the court entered an order stating D was not to be enrolled in the American Boychoir School; directed both parties to cooperate with Dr. Monday; and required Paul F. Whiter, referred to as "Dr. Whiter," to appear at the next hearing, which was scheduled for August 30, 2002.

Plaintiff filed another certification, dated August 29, 2002, in further support of his various applications. Among other issues, plaintiff addressed defendant's proposed residence in Lawrenceville, stating it was a condominium that was also occupied by Dr. Whiter, expressing concern over the proposed "cohabitation arrangement" with a "stranger."

The court conducted a hearing on August 30, 2002, resulting in entry of an order that provided, as follows:

> D shall remain in the Chester schools for this school year (2002-2003). D's music education shall be advanced in many ways (private lessons). Pending further order these parties shall have joint legal custody of D. D shall receive immediate therapeutic counseling with the cost to be shared by the parties. The parties shall recommend a therapist to the court within seven (7) days of today (8/30/02). Mr. O'Callaghan's parenting time shall be re-instituted effective today, August 30, 2002 and he shall return D to Ms. B on Monday morning, September 2, 2002 by 10:00 am. The Chester Library shall be the pick up and drop off point.

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[6] A transcript of the August 23, 2002 hearing is not contained in the record on appeal.

On September 10, 2002, we entered an order granting defendant's application for a stay of the terms of the August 30, 2002 order and stated:

> THE INTENT OF THIS ORDER IS TO PERMIT DEFENDANT, IF POSSIBLE, TO ENROLL D IN THE AMERICAN BOYCHOIR SCHOOL AS A DAY STUDENT FOR THIS SCHOOL TERM. IF DEEMED NECESSARY, WE ALSO DEEM THE NOTICE OF APPEAL TO BE A MOTION FOR LEAVE TO APPEAL, WHICH WE GRANT.

On September 13, 2002, a protective order was entered in the Family Part releasing the report of Dr. Monday to plaintiff upon the condition that it not be copied or released or disclosed to anyone other than a qualified expert for purposes in this litigation.

On October 29, 2002, we issued our unpublished opinion in the prior appeals, affirming the February 2, 2001, March 26, 2001, and June 28, 2001 prior orders entered in the Family Part. At argument, we were informed that additional proceedings have been conducted in the Family Part on the issue of custody and parenting-time. However, by order entered on May 6, 2003, inter alia, we granted plaintiff's application to strike from the record on appeal an order entered on January 15, 2003. At argument, we orally denied defendant's application to supplement the record with certain other proceedings that have occurred in the Family Part since the August 30, 2002 order. We were informed, however, at argument that plaintiff has not had parenting time with D for a significant period of time and that the parties continue to litigate that and other issues in the Family Part.

On or about March 7, 2003, plaintiff filed a motion in this court seeking an order directing that the August 29, 2002

report of Dr. Monday be reviewed and considered on the issues concerning this appeal. On April 1, 2003, we entered an order granting plaintiff's application. In his report, Dr. Monday recommended that plaintiff be granted alternate weekend parenting time with D, in addition to a Wednesday night visit, and that the parties share holidays. Dr. Monday recognized that the parties "have a relationship that can be acrimonious and can lead to legal disputes[,]" and further recommended that the parties "enter into mediation to work through any issues that arise in the future."

On appeal, defendant presents the following arguments for our consideration:

> POINT I
> THE TRIAL COURT ERRED NOT ONLY WHEN IT, SUA SPONTE, AWARDED THE PARTIES JOINT CUSTODY WITHOUT ANY CUSTODY COMPLAINT PENDING AND WITHOUT A HEARING, BUT ALSO WHEN IT PROHIBITED D FROM ATTENDING THE AMERICAN BOYCHOIR SCHOOL.
>
> POINT II
> THE COURT ERRED WHEN IT ALLOWED ITS PERSONAL BIAS AGAINST BOARDING SCHOOLS AFFECT ITS DECISION, WHEN IT ABDICATED ITS DECISION MAKING POWER TO DR. MONDAY AND WHEN IT MICRO-MANAGED THE CASE AS A RESULT OF THE PLAINTIFF'S INCESSANT FILINGS.

After analyzing the record in the light of the written and oral arguments advanced by the parties, we conclude that the August 30, 2002 order, changing the custodial

arrangement from one of sole custody vested in defendant to a joint legal custodial relationship, without a hearing, was unwarranted.

The issues of custody and parenting time were last determined prior to the August 30, 2002 order after a long procedural history of several hearings and resulting orders entered in the Family Part beginning on July 28, 2000 and ending on June 28, 2001. Those orders, which we affirmed in our prior unpublished opinion decided on October 29, 2002, vested sole custody of D with defendant, and recognized this litigation as a high-conflict case.

It is axiomatic that prior to considering a change in custody, plaintiff was required to demonstrate a substantial change in circumstances. Chen v. Heller, 334 N.J. Super. 361, 380 (App. Div. 2000); Todd v. Sheridan, 268 N.J. Super. 387, 398 (App. Div. 1993). Moreover, in light of the prior procedural history and rulings by the Family Part, a plenary hearing was required prior to effecting any change in the custodial relationship. See Peregoy v. Peregoy, 358 N.J. Super. 179, 185 (App. Div. 2003); P.T. v. M.S., 325 N.J. Super. 193, 214 (App. Div. 1999); Mackowski v. Mackowski, 317 N.J. Super. 8, 11-12 (App. Div. 1998).

In a high-conflict custody and parenting-time case where the parties have an inability to communicate or act jointly in the best interests of their child, such as here, joint custody is generally inappropriate since it usually increases and intensifies the conflict, all to the detriment of the child. See Mamolen v. Mamolen, 346 N.J. Super. 493, 502 (App. Div. 2002); Nufrio v. Nufrio, 341 N.J. Super. 548, 555 (App. Div. 2001). There were also issues of material fact in dispute on the issue of D's attendance at the American Boychoir School that required a plenary hearing. Moreover, consideration of expert opinion must be in accordance with R. 5:3-3(d) (communications with an expert must be upon prior notice to the parties and their attorneys who shall be afforded

an opportunity to be present and to be heard during any such communication between the expert and the court); R. 5:3-3(e) (providing the parties the right to discovery); and R. 5:3-3(f) (affording the parties the right to cross-examination of the expert).

The issues raised by plaintiff in his cross-appeal essentially reargue those issues already decided in our previously-issued unpublished opinion in A-4782-00T3 and A-6659-00T3, and are without merit.

Accordingly, we are constrained to reverse the August 30, 2002 order and remand the matter for a plenary hearing on the issue of joint legal custody and D's attendance at the American Boychoir School. Although the record on appeal does not provide us with the specifics, we recognize that additional proceedings have taken place in the Family Part since entry of the August 30, 2002 order that may bear upon these issues. In that connection, we draw the parties' attention to R. 2:9-1(a), which deprives the trial court from acting further on the issue on appeal except to the extent of applications for enforcement, unless directed by this court. See Rolnick v. Rolnick, 262 N.J. Super. 343, 365-66 (App. Div. 1993).

Reversed and remanded on defendant's appeal; affirmed on the cross-appeal.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4782-00T3 and A-6659-00T3

DANIEL J. O'CALLAGHAN,

Plaintiff-Appellant,

v.

V J B,

Defendant-Respondent.

Argued: October 2, 2002 - Decided: October 29, 2002

Before Judges Fall and Weissbard.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket Number FD-14-581-00.

Daniel J. O'Callaghan, appellant, argued the cause pro se.

No brief was filed by respondent.

PER CURIAM

In two separate appeals calendared together, which we consolidate for opinion purposes, plaintiff, Daniel J. O'Callaghan, appeals from several orders entered in the Family Part adjudicating issues pertaining to custody and parenting time of his son, D T. B. Defendant, V J B, is the mother of D.

D was born on June 19, 1992, in New York. Plaintiff and defendant were never married. Plaintiff, a New York attorney, is married and resides in Brooklyn, New York. Defendant is employed as a teacher in the New York City School System and resides, with the child, in Chester, New Jersey. Defendant also spent time with D in New York at the Manhattan apartment of J V, father of her other son, A V. Defendant and J were married in 1986 and a judgment of separation was entered between defendant and J by a New York court in 1995, under which defendant was given the right to occupy the Manhattan apartment. The parties herein resided together in that Manhattan apartment, with D, from early 1992 until mid-1994, when they separated, plaintiff returning to live with his wife in Brooklyn. Defendant moved, with D, to her New Jersey residence in 1996.

In order to fully understand the context of the issues presented in these appeals, a detailed recitation of the procedural history is necessary. On June 22, 2000, plaintiff filed a pro se non-dissolution complaint in the Family Part in Morris County, seeking parenting time with D, as well as an adjudication establishing his paternity of D. A hearing was scheduled for July 14, 2000.

Plaintiff retained counsel and on June 23, 2000, filed a motion, returnable July 14, 2000, seeking an order awarding him temporary custody of D or, in the alternative, establishing a liberal and reasonable parenting-time schedule with D, to include weekday, weekend, summer, and telephonic time; requiring the parties to submit parenting plans pursuant to R. 5:8-5; setting a child support obligation

to be paid by the non-custodial parent; and granting plaintiff an award of counsel fees.

The hearing was re-scheduled to July 17, 2000 and, on that date, the court entered an order carrying the case, and plaintiff's motion, to July 28, 2000. The order, pursuant to a stipulation of the parties, also declared plaintiff to be D's father and set interim parenting time for plaintiff, consisting of one eight-hour session during the day and various telephonic communication. The intervening certifications filed by the parties reflected significant animosity between them and each set forth various allegations concerning the care and safety of D.

On July 28, 2000, a hearing was conducted by Judge Harper in the Family Part, resulting in entry of an order, continuing custody of D with defendant; requiring plaintiff to pay defendant the sum of $60 each week in child support, effective July 14, 2000; and further providing, as follows:

> 1. Parties agree that Plaintiff's name will be added as the father on the child's birth certificate within 30 days.
>
> 2. Attorneys to work out specifics with regard to the automobile and insurance.
>
> 3. Parties are directed to undergo a Best Interest Investigation and home inspection. Parties to fully cooperate.
>
> 4. The child is to be interviewed in connection with the Best Interest Investigation.

5. Defendant's motion for discovery as to Plaintiff's financial situation is granted - Both parties are to exchange financial information as follows:

a. prepare and serve financial interrogatories [within] 14 days.

b. answer interrogatories [within] 30 days of receipt of interrogatories.

c. depositions if necessary to be scheduled within 30 days of receipt of answers to interrogatories.

6. Parties to submit proposed visitation schedules to court by [August 4, 2000].

7. Child to be interviewed [August 10, 2000 at] 3:00 p.m. by Judge Harper.

The judge interviewed D on August 10th and, on August 11, 2000, conducted a conference call with both counsel, during which the judge directed interim parenting time for plaintiff with D and scheduled a further hearing for August 22, 2000, in the event the parties were unable to resolve the parenting-time issues. However, no written order was entered at that point specifying the parenting time.

On or about August 15, 2000, plaintiff filed a substitution of attorney, reflecting his pro se representation. On August 18, 2000, plaintiff sought emergent relief through a proposed order to show cause, supported by his certification dated August 14, 2000. Plaintiff alleged defendant refused to

provide him the agreed-upon parenting time with D, outlined a detailed history of the parties' relationship and, for various reasons, contended defendant was an inappropriate caretaker for D.

As a result of plaintiff's application, and in the absence of Judge Harper, Judge Miniman entered an order on August 18, 2000, directing that plaintiff be afforded continuous parenting time with D between August 18 and August 22, 2000, on which date the court would consider the balance of plaintiff's application.

On August 22, 2000, both parties appeared in the Family Part before Judge Harper. An order was entered, continuing the matter to August 25, 2000. D was returned to the physical custody of defendant. Additional certifications were filed and the court conducted a hearing on August 25, 2000. Defendant provided the court with a report from Jeannette Lofas, a New York social worker and counselor, dated August 24, 2000. Lofas apparently had seen both parties and D, intermittently, since November 1991, and had met with D subsequent to D's parenting-time session with his father during the August 18 to August 22, 2000 period. In her report, Lofas recommended against overnight parenting time in plaintiff's home "until [D] feels more comfortable about staying overnight." An order entered on August 25, 2000, provided for appointment of a guardian ad litem for D; appointment of Dr. Mathias Hagovsky, a psychologist, as therapist for D; directed both parents to meet with Dr. Hagovsky and cooperate in all aspects of D's therapy with regard to parenting-time and custody issues; specified daytime parenting time for plaintiff with D; and continued the matter until a further hearing to be held on September 15, 2000.

On August 30, 2000, plaintiff made another application for emergent relief through submission of a proposed order to show cause, supported by his certification dated August 28, 2000. Plaintiff contended Judge Harper's reliance upon the report of Lofas was inappropriate, and that plaintiff was unfairly prevented from providing relevant information to the court. In his application, plaintiff sought, inter alia, a stay of the order appointing a guardian ad litem and therapist, disqualification of Lofas, and restoration of his overnight parenting time.

The court entered an order to show cause on August 30, 2000, returnable on September 8, 2000, and a separate order, also dated August 30, 2000, appointing Ann Scucci, Esq. as guardian ad litem for D, directing Scucci to "interview the parties and the child and make recommendations to the Court concerning the best interest of the child." Prior to the return date of the order to show cause, defendant filed a certification dated September 7, 2000, expressing willingness to work with the court-appointed guardian ad litem and therapist, and asserted that plaintiff "is a much too tightly-wound 'control freak' who insists on getting his way and personally attacking everyone who disagrees with him."

On September 8, 2000, a hearing was conducted by Judge Harper concerning the issues addressed in the August 30, 2000 order to show cause. An order entered on that date continued the appointments of Hagovsky and Scucci; adjourned the hearing to September 15, 2000; permitted plaintiff to reply to defendant's certification; and provided for further daytime parenting time for plaintiff with D.

Plaintiff submitted a reply certification dated September 14, 2000, criticizing Judge Harper's handling of

the parenting-time issues, criticizing defendant's attorney, and attaching a copy of a complaint filed by plaintiff against Lofas in the Supreme Court of New York, Kings County, alleging, inter alia, a breach of the psychologist-patient privilege and seeking damages.

On September 15, 2000, another hearing was conducted before Judge Harper in the Family Part. Thereafter, a significant dispute arose concerning the content of the form of order submitted by defendant's counsel. Additionally, plaintiff sought reconsider-ation of the judge's rulings, supported by his September 22, 2000 certification.

On or about October 9, 2000, plaintiff filed a motion, returnable on November 10, 2000, seeking custody of D and an order holding defendant's attorney in contempt, based upon that attorney's alleged instructions to plaintiff to violate the terms of plaintiff's court-ordered parenting time.

On October 23, 2000, plaintiff presented an emergent application to the Family Part upon submission of an order to show cause seeking, inter alia, the recusal of Judge Harper, custody of D or, alternatively, overnight parenting time pending a plenary hearing. In Judge Harper's absence, the application was considered by Judge Wilson, who entered an order on October 23, 2000, finding "no basis for interlocutory relief on the basis of irreparable injury, this matter is scheduled as a motion." The request for emergent relief, as requested in the order to show cause signed by Judge Wilson, was made returnable on October 31, 2000. All other pending matters were scheduled before Judge Harper for hearing on November 17, 2000.

On October 26, 2000, an order was entered in this court denying plaintiff's application for emergent relief.

On October 27, 2000, Judge Harper entered an order, prepared by the court, memorializing his findings and rulings at the September 15, 2000 hearing. That order continued the appointments of Scucci and Hagovsky; directed the parties to consult concerning possible agreement for the appointment of an alternative therapist who participated in defendant's insurance coverage plan or, in the absence of agreement, continued the appointment of Hagovsky; permitted plaintiff to conduct discovery concerning the interview of D by Lofas; denied, without prejudice, plaintiff's application to depose defendant's attorney; denied plaintiff's application for a plenary hearing concerning the letter submitted to the court by Lofas, but permitted that letter to be reviewed by any psychologist at the request of either party; denied plaintiff's application to disqualify Lofas; denied plaintiff's application to be present during the court-appointed psychologist's interview of D; denied plaintiff's request for overnight parenting-time sessions pending the court's receipt of reports from the appointed guardian ad litem and psychologist; directed the court-appointed psychologist to conduct "evaluations of both parties and the child, addressing parenting time of the child with Plaintiff, including overnights, as well as any potential parental alienation[;]" determined there was no basis for the court to intervene based upon plaintiff's concerns for safety of the child; and denied all other requests for relief not addressed in the order.

On November 2, 2000, Judge Harper entered an order denying the relief requested by plaintiff in the order to show executed on October 23, 2000, and continued the parenting-time schedule previously set forth in the August 25, 2000 order. In doing so, the judge attached the following findings of fact and conclusions of law to the executed order:

1. The entering of an Order based on the September 15, 2000, proceedings, was postponed for numerous reasons. As an Order could not be entered on the day of the proceedings, as the law clerk was unavailable with other clients, this Court requested that an Order be submitted to the Court reflecting the outcome of the instant proceedings. Defendant's attorney submitted the proposed order on September 19, 2000. Objections, as well as a request for reconsideration, were received by this Court on September 22, 2000. As the proposed order and the objections were contradictory, it was necessary that the audio tape of the September 15, 2000, proceedings be obtained to ensure the accuracy of the Order which would be entered regarding those proceedings. Due to the high volume of cases and emergent matters on the calendar, the audio tape of the proceedings was not reviewed until October 27, 2000. Upon such review, an Order was immediately filed and mailed to the parties.

2. Based upon previous submissions of the parties, the Court is satisfied that the safety and well-being of the child, D T B, is not in danger and Defendant is appropriately providing for the child's care and safety.

3. The Court adopts as its findings paragraphs 9(A) and 9(B) of Defendant's Certification dated August 21, 2000.

4. As concerns have been brought to the Court regarding visitation, including overnights, the Court deemed it necessary to appoint both a *guardian ad litem* and a psychologist. Pending the receipt of reports from both of the Court's appointees, overnight visitation of the child, D T B with Plaintiff will not occur.

5. The Court is aware of Plaintiff's transportation problems and therefore directs that Defendant is to provide the transportation for Plaintiff's visitation with the child, D T B, on Saturdays from 10am to 6pm, in accordance with the Order issued on August 25, 2000.

On November 15, 2000, plaintiff moved for a stay of the November 2, 2000 order. That application was denied by Judge Harper in an order entered on that date, accompanied by the following findings of fact and conclusions of law:

1. The Court adopts as its findings numbers one through five of its findings of fact and conclusions of law attached to the Court's Order filed and entered on November 2, 2000.

2. In accordance with the Court's Order filed and entered on November 2, 2000, the Court has determined that there is no irreparable injury to the minor child as visitation of Plaintiff with the minor child is to proceed as Ordered on August 25, 2000, on

Saturdays from 10am-6pm, with Defendant providing transportation, pending further Order of the Court.

3. Pending further Order of the Court, and receipt of reports from both the Court appointed *guardian ad litem* and psychologist, overnight visitation of Plaintiff with the minor child will not occur. There is much high conflict between these parties which has so seriously impacted the child as discussed in the certifications filed by the parties and others, and these parties are so litigious and apparently incapable of recognizing what is in the best interests of their son without the intervention of a *guardian ad litem* and psychologist that it is necessary to appoint a *guardian ad litem* and a psychologist to bring this matter to an appropriate resolution.

4. Unfortunately, the Court's effort to bring such assistance to the parties is misperceived by the Plaintiff as an effort toward delay and not recognized as needed under the circumstances. Limited visitation will continue until the Court receives an impartial assessment and an accurate account of what is in the child's best interest. There is no irreparable harm as Plaintiff claims.

By letter dated November 16, 2000, the court adjourned the motions scheduled for November 17, 2000 and rescheduled the matters for a hearing to be held on December 8, 2000. Plaintiff then filed an emergent application seeking

reconsideration of the adjournment, which was denied by an order entered on November 17, 2000. Judge Harper also addressed plaintiff's application for his recusal in findings of fact and conclusions of law attached to the November 17, 2000 order, stating:

> The plaintiff, Daniel J. O'Callaghan, an attorney at law of the State of New York who appears "pro se" herein, has requested that this Court recuse itself from hearing further on this matter. Apparently, the plaintiff contends that he has been seriously aggrieved by this Court's rulings and prejudiced as far as his overnight visitation with the parties' son, D, is concerned. This court has directed that visitation with the plaintiff continue, but that overnight visitation be suspended, for reasons previously stated on the record and now reiterated herein. The overnight visitation was suspended because of conflicts between the parties and the impact same is having upon the child as evidenced by certifications filed with the Court in connection with the numerous applications brought before this Court. Visitation was limited because the defendant expressed concerns over the contents of the so-called "Lofas" report, and in reliance upon the Court's interview of the child who at the time had been positively disposed towards visitation with his father. Thereafter for some apparent reason visitation with dad became a problem and a concern for D.
>
> Obviously, the child is squarely in the middle of two squabbling and contentious parents who

cannot, without the intervention of a guardian ad litem and a psychologist, perceive the best interests of their son nor understand the injury the contentiousness visits upon the child. Their certifications at times are rife with conflicting statements about what is happening to D and why and what appears to be best for him. The Court is also concerned that the purportedly well intentioned efforts of the defendant to protect and safeguard her son while he is away from her with his father are perceived by the plaintiff (who appears suspicious of her behavior and motives) to suggest that she is engaging in parental alienation. This Court is concerned about that claim and plaintiff's perceptions especially when they lead him to resort to personal attacks upon defendant's counsel and this Court.

This is a "high conflict case" which now threatens, if not properly managed, to engulf defendant's counsel and the Court in efforts to divert attention from the best interests of D to plaintiff's claims of prejudicial and unfair treatment by those who disagree with him. His efforts to have this Court recuse itself are obviously designed to seek another judge who will make rulings more favorable to plaintiff's position. As discussed below there is no basis for recusal and this Court will not reward the plaintiff's efforts to forum shop. Plaintiff must cooperate with the guardian ad litem and the psychologist, continue with his visitation

as ordered and reduce the level of conflict. To do otherwise, is not in the best interests for D.

Under R. 1:12-1 a judge shall be disqualified on the court's own motion and shall not sit on a matter due to a close family relationship with a litigant or attorney, or due to prior representation, personal interest in the outcome or such other reason which might preclude a fair and unbiased hearing and judgment or which reasonably might lead counsel or the parties to believe so.

In this case, plaintiff has shown absolutely no proof of any one of the disqualifiers nor would anyone reasonably be lead to believe that an unbiased hearing or judgment could not be achieved. This Court has no personal, family or financial interest in this matter nor any such connection with the parties, counsel or anyone associated with this case, plaintiff's claims to the contrary notwithstanding. For these reasons plaintiff's motion to have the court recuse itself [is] denied.

The Court has rescheduled all pending motions to December 8, 2000 because plaintiff had not been properly served with defendant's motion purportedly returnable October 20, 2000,[1] per

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[1] Although the record on appeal does not contain a copy of the referenced motion by defendant, it appears from a review of defendant's October 4, 2000 certification contained in the record that defendant's

(continued...)

> the Rules of Court and the Court's desire to hear and decide all pending motions expeditiously after the plaintiff had been duly served and had properly filed opposing papers. All parties must be properly served with all pleadings, motions, orders to show cause, etc., and will be given appropriate and necessary time to respond to ensure a fair and impartial hearing and determination in this case.

On or about November 21, 2000, plaintiff filed a certification and memorandum in support of his application for an order to show cause, requesting Judge Harper to reconsider the denial of plaintiff's recusal application. Plaintiff also sought various other relief, including seeking an order precluding defendant from enrolling D in the same boarding school attended by his brother, A V.

On December 4, 2000, this court entered an order denying plaintiff's application seeking leave to appeal from the November 17, 2000 order and for a stay.

Judge Harper conducted a hearing on all pending applications on December 8, 2000, and entered an order on December 13, 2000, that provided, in summary, as follows:

> 1. Plaintiff's application for the recusal of Judge Harper is denied for the

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(...continued)
motion concerned parenting-time transportation; plaintiff's due answers to defendant's financial interrogatories; title to a motor vehicle; proof of maintenance of life insurance naming the child as beneficiary; and counsel fees and costs.

reasons set forth in the court's findings attached to the November 17, 2000 order;

2. Plaintiff's motion to find defendant in violation of litigant's rights is granted, and defendant is directed to comply with all court orders concerning plaintiff's parenting time;

3. Plaintiff's application to impose sanctions against defendant's counsel is denied;

4. Pending further order of the court, plaintiff's parenting time with D was specified;

5. Pending further order, plaintiff shall pay $90 each week in child support, plus $10 each week toward liquidation of $835 in arrears. Financial discovery is to go forward as ordered;

6. The parties are to cooperate with the *guardian ad litem* and court-appointed psychologist to allow expeditious completion of their reports;

7. Plaintiff is to file a motion with Judge Wilson to ascertain that judge's findings and basis for entry of the October 23, 2000 order;

8. Plaintiff's request for attorneys' fees and costs is denied. The court reserves

decision on defendant's request for counsel fees and costs until conclusion of the matter;

9. All other requests for relief not addressed in the order are denied.

The judge attached the following statement to the December 13, 2000 order, representing his factual findings and conclusions of law:

1. A plenary hearing regarding the certification submitted by Ms. Jeanette Lofas is not necessary. (See copy of certification attached hereto and made a part hereof as Exhibit A). The certification was not the impetus behind the Court's decision to limit Plaintiff's visitation to daytime hours, but rather only a factor among the totality of the circumstances presented to the Court at the time. The Court even offered Plaintiff discovery on circumstances surrounding the certification of Ms. Lofas, set forth in paragraphs two (2) and three (3) of this Court's order and findings dated October 27, 2000. To date, neither Plaintiff nor Defendant's attorney has come to this Court with a case management order concerning a timetable for depositions or discovery on the matter. Plaintiff has elected to pursue discovery regarding "Lofas" in a New York litigation which he has instituted against her.

2. Pending further Order of the Court until reports have been received from the *guardian ad litem* and psychologist, Defendant will remain temporary physical custodian of the parties' minor child, while the parties remain joint legal custodians.

The parties are to cooperate with the Court appointed *guardian ad litem*, Ann T. Scucci, Esq., and Dr. Mathias Hagovsky, Ph.D., psychologist, such that said persons are to complete their reports as expeditiously as possible. The Court has received a preliminary report from Ms. Scucci (a copy of which is attached hereto and made a part hereof as Exhibit B).

3. The Court continues to note that Plaintiff's parenting time has not been suspended, but is to take place absent overnights for reasons previously stated on the record.

4. As previously stated on the record, the Court appointed the *guardian ad litem* and psychologist due to the contradictory certifications and the nature of the allegations contained therein provided by the parties regarding the events surrounding visitation of the child with Plaintiff, after this Court had approved overnight visitation for the child with Plaintiff. The high degree of conflict between these parties is continuing and clearly evident. . . . The Court continues to believe that the appointments are necessary to help the Court determine D's best interests, and will rely on the reports from both the *guardian ad litem* and Court appointed psychologist, as well as other relevant evidence, in order to determine what exactly is in the child's best interests.

5. The Court appreciates the fact that Plaintiff has voluntarily increased his child support payments to ninety dollars ($90.00) weekly. To that effect, arrears have been fixed at eight hundred thirty-five

dollars ($835.00) in view of Defendant's statement in paragraph 9, child support, of her Certification dated December 3, 2000, which is incorporated by reference and made a part hereof.

6. Plaintiff's request that Defendant's counsel, David F. Salvaggio, Esq., be sanctioned is without merit. There is no competent evidence on the record which would support such a finding by this Court.

7. Plaintiff has been denied visitation previously ordered by this Court as a result of Defendant's overly protective efforts to safeguard the welfare and safety of the child because of her perceived fears and concerns many of which appear to be amplified because of her lack of trust in Plaintiff and her doubts in his parental judgment and parenting skills. Defendant must abide by this Court's visitation orders and provide the child to Plaintiff for Court ordered visits or risk further sanction by this Court. The Court ordered visitation schedule shall be enforced.

The December 6, 2000 preliminary report from the guardian ad litem, referred to in the Judge's findings, noted that D likes his father and said "it would be 'okay' if he stayed overnight sometimes." However, Scucci stated her attempt to meet with plaintiff was unsuccessful even though she had left at least one message at his office for him to telephone her. In summary, Scucci stated, in pertinent part:

> I am unable to offer the Court concrete recommendations until these meetings are scheduled and completed. At this juncture, I do recommend that visitation be scheduled in

> a fashion so as to minimize the burden of travel on D. I also recommend counseling for D and parenting mediation for the parents, who have no present ability to work with each other (based upon D's account.)

Scucci asked that the court direct the parties to cooperate with her efforts to allow her to complete the assignment.

By letter to Scucci dated December 13, 2000, with copies to both parties, Judge Harper requested her to contact plaintiff in light of plaintiff's contention that Scucci had not attempted to contact him.

By letter to Scucci dated December 21, 2000, plaintiff asserted that her representations to the court that she had contacted his office were not true and he objected to her appointment and performance as guardian ad litem. Scucci replied to plaintiff by letter dated December 26, 2000, expressing her desire to assist all parties in resolving the matter, and requesting that plaintiff arrange to meet with her, "even if that means meeting with you and D together at your home in New York." Plaintiff replied to Scucci by letter dated December 29, 2000, asking her to be available for a hearing in Judge Harper's courtroom scheduled for January 5, 2001. The referenced hearing was the scheduled date for plaintiff's motion for reconsideration of the December 13, 2000 order. Plaintiff also filed a separate motion seeking reconsideration of all prior orders.

Plaintiff filed a certification dated December 30, 2000 in support of his application for reconsideration. In that certification, plaintiff criticized Judge Harper, defendant, defendant's attorney, Scucci, and Lofas.

Defendant filed a cross-motion, seeking an assessment of counsel fees against plaintiff; amplification of the court's finding concerning defendant's non-compliance with plaintiff's parenting time; scheduling of plaintiff's future parenting-time sessions; dismissal of plaintiff's complaint for his failure to meet with the guardian ad litem or with Hagovsky; reconsideration of the child-support award by increasing it to the sum of $137 per week; an order holding plaintiff in violation of litigant's rights for failure to provide answers to the financial interrogatories; and determining the appropriateness of plaintiff's request for production of documents. By letter to both parties dated January 3, 2001, the court adjourned all pending matters to January 19, 2001.

By letter to Judge Harper dated January 4, 2001, plaintiff objected to the adjournment and requested various relief, including an order directing the disqualification of Scucci and defendant's counsel, and establishing his parenting-time schedule between January 4 and 19, 2001. On January 4, 2001, Judge Harper entered an order specifying plaintiff's parenting-time sessions with D pending the January 19th hearing and advised that all other matters would be addressed on the date of the adjourned hearing. At plaintiff's request, the scheduled January 19th hearing was adjourned and rescheduled to February 2, 2001.

Plaintiff then made another application for emergent relief, again seeking the recusal of Judge Harper and the disqualification of defendant's attorney, Scucci, and Hagovsky, and the establishment of overnight parenting-time sessions. Plaintiff contended that an attorney, Michelle Hart, Esq., appeared as "of counsel" on both the letterhead of defendant's counsel and Scucci, necessitating the disqualification of both Scucci and defendant's counsel. An

order to show cause was entered on January 18, 2001, directing that those issues be considered at the rescheduled February 2, 2001 hearing.

Based upon an additional application by plaintiff, an order to show cause was executed on January 29, 2001, returnable February 2, 2001, directing defendant to show cause why an order should not be entered directing discovery concerning plaintiff' applications for disqualification, consisting of the production of various documentation and the scheduling of a plenary hearing on those disqualification requests.

On January 23, 2001, the Supreme Court entered an order denying plaintiff's motion to expand the record, and denied plaintiff's motion for leave to appeal from our December 4, 2000 order.

On February 2, 2001, Judge Harper conducted a hearing on all pending applications, and entered an order on February 6, 2001 that provided, in summary, as follows:

1. Plaintiff's motions for reconsideration are denied.

2. Plaintiff's orders to show cause regarding the boarding school, disqualifications, and discovery on such disqualification requests are denied.

3. The court imposed the following sanctions against plaintiff:

(a) plaintiff's complaint for custody

and/or visitation is dismissed; and

(b) plaintiff is ordered to pay defendant's counsel the sum of $643.45 within thirty days.

4. The court-appointed guardian ad litem, Ann T. Scucci, Esq. and court-appointed psychologist, Dr. Mathias Hagovsky, are relieved of their duties.

5. Parenting time for plaintiff with D shall proceed and the parties shall share transportation. Plaintiff's parenting time shall consist of each Saturday from 10:00 a.m. to 6:00 p.m., taking place in New York one week and in New Jersey the next week and alternating thereafter in that fashion. Any make-up parenting time due to cancellation, upon forty-eight hours prior notice, shall take place on the succeeding Sunday.

6. Although plaintiff's complaint is dismissed, the court "uses its discretion to leave the child support order of ninety dollars ($90) weekly in place."

7. Defendant's application for amplification of the reasons for concluding she failed to comply with the parenting-time order is granted, such reasons set forth in the court's letter opinion.

8. Plaintiff is to comply with outstanding discovery within thirty days. Defendant is to provide plaintiff with D's school and medical records within 30 days. All other requests for discovery are denied.

In support of this order, Judge Harper issued a sixteen-page letter opinion dated February 6, 2001, addressing each issue and providing, in pertinent part:

> First, to the threshold question of recusal, the Court respectfully directs the parties to its decision of November 17, 2000 which is already a matter of record in this matter. The Court hereby reaffirms its findings of fact and conclusions of law and incorporates same herein by reference as if the same were fully set forth herein at length. The plaintiff also apparently has sought to effectuate this Court's disqualification by filing a grievance against the same with the Advisory Committee on Judicial Conduct. Pursuant to the Rules of Court, the filing of allegations concerning a judge shall not automatically require the judge's recusal from a matter involving the grievant. See R. 2:15-24. This Court deems the plaintiff's continued request for reconsideration of the Court's earlier recusal decision not to require the immediate disqualification of this Court. The continued participation by the plaintiff before this Court subsequent to the filing of the aforesaid grievance is found by this Court to be an election to proceed and to receive this Court's

determination on the recusal matter and others that are outstanding. Henceforth, the court will proceed and render its decision.

Pursuant to R. 4:49-2 the Court Rules provide, in pertinent part, that a motion for reconsideration seeking to amend or alter an order shall state with specificity the basis on which it is made including a statement of matters or controlling decision which counsel believes the Court has overlooked or to which it has erred. In the instant request to again have this Court recuse itself and to reconsider its earlier determinations, the plaintiff has advanced nothing new but seeks only to have the Court again review the points earlier advanced. It appears that the plaintiff believes through dogged persistence, he will convince the Court of the merit of his views and the error of its ways. However, based upon the standard by which this Court must be guided, it hereby affirms and incorporates its prior findings and conclusions of law herein, all of which were previously made a matter of record on the dates hereinabove specified. Therefore, the Court denies the request for reconsideration.

The Court is also required to comment on certain remarks of the plaintiff which were placed upon the record in the hearing of February 2, 2001. The plaintiff contends that the parties' child D was traumatized by the withdrawal of Family Court resources by this Court, and that the Court is blaming the

victim, that is Mr. O'Callaghan. He contends this Court has abandoned the child. However, Mr. O'Callaghan conveniently omits the fact that it was this Court that had directed that visitation proceed after an interview with D which has been videotaped and a telephone conference with counsel, William T. Rittley, Esq. then representing the plaintiff and Daniel Salvaggio, Esq. representing the defendant. After the Court had found that visitation including overnights was appropriate, and the visitation it previously ordered did not come about, the plaintiff filed an order to show cause, which was heard by Judge Miniman in the absence of this Court who was unavailable because of vacation. Judge Miniman made a determination that immediate visitation for several days take place because of the denial of visitation to Mr. O'Callaghan by Ms. B, the defendant. That decision is a matter of record as well. After that Ms. B through her pleadings and an appearance before the Court made this Court aware of the so-called "Lofas letter" which is really in the form of a certification. The certification is from a therapist who had seen the child and the defendant alleging trauma done to the child because of Judge Miniman's order of immediate extended overnight visitation as a make up for that visitation previously denied or frustrated by defendant. This Court made its decision for reasons previously stated on the record and affirmed in its decision of December 13, 2000, directed restricted visitation and the appointment of a Guardian

ad Litem, Ann Scucci, Esq. and a psychologist, Dr. Matthias Hagovsky of Livingston, New Jersey. The Court ordered that there be a quick response to its order and that the parties cooperate. Thereafter, rather than cooperate, the plaintiff filed a series of challenges to the Court's determination and sought to stay the actions concerning the appointments and to have this Court rescind the same. Much energy was expended by the plaintiff, and thereafter the defendant, in dealing with these challenges. Ms. Scucci was made aware as she indicated on the record on February 2, 2001, that this Court was desirous of her proceeding as expeditiously as possible and she was called to the Court so that she could meet the parties and begin the process of gathering information to assist this Court in deciding the outstanding issues. This occurred on September 8, 2000.

This Court is satisfied from the plaintiff's conduct and the defendant's certifications that at no time did Mr. O'Callaghan cooperate with this Court's efforts to have the Guardian as Litem discharge her duties, and further, to have a Psychologist assess the parenting abilities of the parties and provide an evaluation. The plaintiff has some mistaken notion that the Court should enforce its own orders sua sponte. The Court has responded appropriately in this case to the requests of the parties for its intervention. The Court appointed qualified professionals to assist it in fact-finding only to have its efforts constantly

frustrated by the plaintiff who sought to challenge the appropriateness of the appointments and who resisted cooperating. Incredibly, plaintiff now claims that it was the Court who failed to see to it that the professionals had completed their assignments in a timely fashion. The plaintiff apparently fails to comprehend the inconsistency of his position and seeks only to blame the Court instead of himself for the failure of the professionals to complete their assignments. It is evident that Mr. O'Callaghan is seeking to delay and frustrate the Court's efforts to gather facts about this matter through legal maneuvering and challenges. There is no other reasonable or appropriate explanation.

Plaintiff's argument is circular. He seeks to point to everyone else as the cause of the delay. I daresay, if he had cooperated, met with Ms. Scucci, and allowed her to complete her work, we would have had her report by now. The same is true with Dr. Hagovsky. It becomes evident that the plaintiff is obsessed with legal challenges and cannot see that if he would only allow the Court appointed professionals to do their work and submit to this fact-finding effort, the Court then would be in a position to address the issue about which he complains, namely, whether the child has been traumatized, and if so, by whom. He blames the Court for the delay which he has occasioned.

His distrust of the Court and others is evident in his papers and his claim of "feeling prejudiced" every time he comes in this Court for a determination. It is unfortunate that he feels the way he does, but that feeling does not dissuade this Court from doing its duty to render its determination in the best interest of D.

The Court also wishes to note that it has entered orders, such as its order of October 27, 2000, which recognized the initial difficulty for the parties that the Court appointed psychologist was not apparently a participant in the defendant's insurance coverage and there would be additional costs from the evaluation. The Court, in order to accommodate the parties, allowed for the appointment of another psychologist covered under the insurance program if the parties could agree; if not, Dr. Hagovsky remained the court appointed expert. In the same order, the Court clarified the psychologist's role and directed that: "the psychologist, among any issues he/she deems appropriate is also to conduct an examination/investigation including but not limited to the evaluation of both parties and the child, addressing parenting time of the child with plaintiff, including overnights as well as any potential parental alienation." The claim has been made by Mr. O'Callaghan that the defendant was seeking to alienate the child from him. The order also provided that the plaintiff was not permitted to be present at the psychologist's interview/examination of the

child as plaintiff had requested, and further the psychologist was to conduct the interview/examination as he/she sees fit and is to obtain input from the parties as appropriate. The so-called "Lofas letter" was not sealed and could be reviewed by the psychologist as he/she deemed necessary.

Accordingly, safeguards were in place by the Court under its order of October 27, 2000, from the so-called "taint of the Lofas letter" as claimed by the plaintiff. There is absolutely no reason, except the plaintiff's distrust of the Court and the defendant, for him to believe that the Lofas certification could be so potent as to sway a reputable psychologist who had interviewed the parties and the child as to the appropriateness of Mr. O'Callaghan as a parent or as to the wisdom of overnight visitation for the child with his father. Mr. O'Callaghan gives far too much credit to Lofas and little to Dr. Hagovsky.

The Court's order of December 13, 2000 demonstrates that the Court was desirous to conclude the matter as expeditiously as possible because it again, at paragraph 6 of that order, directed: "all parties are to cooperate with the Guardian ad Litem and the court appointed psychologist as they request in order that their reports may be expeditiously completed." Under no reasonable view could this Court be seen to have abdicated its responsibilities to have this matter move forward as it had directed, nor that it has

abandoned the child, the plaintiff's protests to the contrary, notwithstanding.

The defendant filed a motion returnable January 5, 2001 in which the defendant sought sanctions against the plaintiff including the dismissal of the complaint and the payment of all of defendant's legal fees and costs incurred in the entire case, unless the plaintiff immediately contacts Dr. Hagovsky and meets with him as well as plaintiff's wife, at Dr. Hagovsky's office. It is clear as recently as the oral argument of February 2, 2001, that the plaintiff has no intention to cooperate nor to meet with Dr. Hagovsky, nor with Ms. Scucci. All plaintiff has done is frustrated the Court's efforts to have fact-finding proceed. All he has caused the Court to do is to return and reconsider several times, issues that he sought also to appeal contemporaneously to the Superior Court Appellate Division, and then the New Jersey Supreme Court. To repeatedly bring matters before this Court while appealing them to other courts suggests the obsession of the plaintiff with legal challenges and with having things proceed in a fashion which he wants. This conduct is evidenced by the testimony of the defendant in her certifications of how when she and the defendant have a difference of view on parenting, he will disengage and proceed to take matters into his own hands, such as on the visitation exchanges. Defendant tells the Court how plaintiff abruptly terminates conversations and leaves with the child, only

to have the defendant left worrying as to the time of return of the child from the visitation. To use the common expression "it appears to be his way or the highway" in such matters. This attitude, this failure to cooperate, all clearly demonstrate to this Court that the plaintiff cannot cooperate and will not follow the Court's orders such that the Court must impose sanctions upon the plaintiff. Accordingly, the complaint of the plaintiff for custody and/or visitation is dismissed for his failure to follow the orders of the court and for his repeated efforts to frustrate and delay the fact-finding process as enumerated above. This situation has spiraled out of control and must be immediately rectified. Accordingly, the dismissal of the complaint with sanctions will place the responsibility squarely where it belongs which is upon the plaintiff. Further, if the plaintiff seeks to have the Court modify the visitation schedule which it hereinafter imposes, then he will have to demonstrate sufficient cause to the Court to change the visitation to the visitation plan he seeks.

* * * *

The defendant's application for counsel fees in the amount of $632.45 is granted. The Court is satisfied that it was because of the numerous applications submitted by the plaintiff to address issues already determined by the Court, that defendant was caused to incur legal fees and costs unreasonably and unnecessarily. The defendant had to file the motion for

sanctions. The defendant has applied for the sanctions relief in good faith as a result of the repeated number of applications brought by the plaintiff as hereinabove discussed. The defendant had to incur unnecessary legal fees and costs. The defendant has demonstrated her financial need and has incurred these counsel fees and costs outside of any legal services program offered by her employer. The plaintiff who is a New York attorney, has the financial ability as previously demonstrated to this court, to pay the counsel fees and costs. Accordingly, the award of fees and costs is made pursuant to R. 5:3-7(a) as a sanction for plaintiff's willful failure to comply with custody/parenting time orders.

It would not be appropriate for this Court, even though it has dismissed the plaintiff's complaint for the reasons hereinabove stated, to withhold comment on the various applications that Mr. O'Callaghan has made that have charged an actual or apparent conflict of interest between Ms. Scucci, the court appointed Guardian ad Litem and Mr. Salvaggio, defendant's counsel. Ms. Scucci has, in her certification and in her statements to this court, satisfied the Court that there is no connection in any way between her office through Michelle Hart, Esq. to the office of David Salvaggi, Esq. Ms. Hart has her own separated arrangement for sharing office space with Ms. Scucci. Ms. Hart has not been made privy to the contents of any files that are

personal to the Guardian ad Litem, and that are not law office files of Ann Scucci, Esq. Ms. Scucci has certified and has stated in open court that her appointment as Guardian ad Litem is a personal and individual appointment and is not shared in any manner with office associates. Ms. Hart's role has been limited in the involvement of the law practice to certain clients of Ms. Scucci and her role has not involved the Guardian ad Litem files and this file in particular. Ms. Hart has not done any work on the same. Ms. Hart certifies to that. It is evident that Ms. Hart joined the office of Ms. Scucci in terms of having her name listed as "of counsel" after the appointment of Ms. Scucci as Guardian ad Litem in this case. It was some time in or about early October, 2000, when she made the association with Ms. Scucci that is challenged by plaintiff, Daniel O'Callaghan in this case. Ms. Hart's certification confirms this. Ms. Hart began her association with Mr. Salvaggio as of counsel in early August, 2000. This finding is based on her certification and Mr. Salvaggio's certification filed with the court. It is clear that her role has been limited as well with Mr. Salvaggio's office and at no time did Ms. Hart have any knowledge of the O'Callaghan-B matter, nor did she work on the file in his office. She and Mr. Salvaggio certify to that.

The fact that Ms. Hart does carry an "of counsel" association with both law offices does cause this Court concern in terms of the claimed appearance of any impropriety. While

the Court finds no conflict of interest, and no impropriety, it is satisfied under all the circumstances that were this matter to continue further, it would have relieved Ms. Scucci from her obligations in this case because of the claimed appearance of impropriety. The Court finds that Ms. Scucci has acted appropriately under the circum- stances, has discharged her responsibilities as it would have expected her to, and she has been frustrated in completing her report by Mr. O'Callaghan. In view of this Court's determination dismissing the complaint, it frees Ms. Scucci of any obligation to further respond in the position of Guardian ad Litem for D. The Court knows that she truly shares a concern for D as does this Court, but any actions she takes hereafter will strictly be those of a volunteer and will not be at the direction of this Court nor under the cloak of a Guardian ad Litem.

* * * *

. . . The defendant right now, is the more appropriate parent to have physical custody, and in fact, is the more appropriate parent to be the sole decision maker regarding D's welfare. Of the two parents, she appears to be the better grounded in terms of her emotional stability, parenting skills and better able to carry forward what is needed for D. Her choice of a boarding school for D under the circumstances, as she explained in her papers before this Court, appears well made,

> especially in view of the current living arrangements between plaintiff residing and working in New York and the defendant residing in Chester, New Jersey, but working in New York City. If D were to attend the boarding school in New York City, it would be easier for the plaintiff to access his son for visitation and daily contact would be facilitated. The defendant's older son already attends that school. Thus, there would be the ability, if D enrolled, for D to have access to his older half-brother. There would also be at least a greater opportunity for plaintiff to have closer contact with his son, which he states is frustrated by his inability to speak to his son through telephonic communication, as claimed in his certification. The frequent contact of the parties with New York and D's desire to attend the boarding school can be accommodated by D attending the school and regular parenting contacts with D by both parents. The quality of education provided by the boarding school and the opportunities for D's educational growth and development appear to be good at St. Thomas.
>
> [Citations omitted.]

On or about February 16, 2001, defendant filed a motion, returnable March 16, 2001, seeking an order fixing plaintiff's child support arrears and requiring plaintiff to bring his support account current; compelling plaintiff to turn over to defendant her 1995 Saturn automobile along with its certificate of title; and for an additional award of counsel

fees. Plaintiff filed a cross-motion, seeking a reduction in his child support obligation.

These motions were argued before Judge Harper on March 23, 2001. On March 26, 2001, the court entered an order, denying plaintiff's application to reduce his child support obligation, and ordering plaintiff to pay defendant's counsel the sum of $9,559.43 in additional counsel fees. All other applications were denied. The judge appended to that order a statement of his factual findings and conclusions of law stating, in relevant part:

> 2. While plaintiff has submitted a "profit and loss" statement of his law practice for the calendar year 2000, it is not prepared by an accountant or a similarly situated preparer. Rather, it seems to be an estimate from plaintiff himself. A copy of plaintiff's 2000 tax returns may have yielded a different decision, however, copies of plaintiff's returns have not been submitted to the Court (as plaintiff states they have not been filed). Therefore, the Court has determined that the current weekly child support obligation of ninety dollars ($90.00) will continue.
>
> 3. The Court accepts plaintiff's position that he is current with child support through March 23, 2001 based upon his certification. Therefore, no electronic transfer of funds for payment of child support is necessary. Payments will be made by plaintiff directly to defendant for child support pending further order.

4. Using defendant's exhibits of invoices as to the amount due of counsel fees and costs, the Court has consistently arrived at a figure of ten-thousand one-hundred ninety-one dollars eighty-eight cents ($10,191.88). That figure, minus plaintiff's payment of six-hundred thirty-two dollars forty-five cents as per this Court's February 6, 2001 order, is nine-thousand five-hundred fifty-nine dollars forty-three cents ($9,559.43). This amount is due defendant's counsel by plaintiff no later than sixty (60) days from the date of this Order. Please see page nine (9) of this Court's February 6, 2001 letter decision as to the circumstances surrounding the imposition of counsel fees. The Court incorporates herein said findings and conclusions as if same were set forth herein at length.

5. Regarding the 1995 Saturn automobile, the Court finds that defendant is seeking a replevin of the vehicle. This Court does not have the requisite jurisdiction to entertain such an action. Accordingly, the parties are referred to the Civil Division if they choose to pursue further action regarding the vehicle under R. 4:61-1.

On April 23, 2001, plaintiff filed a notice of appeal from the February 6, 2001 and March 26, 2001 orders entered in the Family Part. The appeal was docketed under A-4782-00T3.

On or about March 23, 2001, plaintiff sought an order to show cause directed to the assignment judge, seeking rescheduling of all matters heard by Judge Harper before a different judge. On April 27, 2001, Assignment Judge Stanton executed an order declining to entertain plaintiff's proposed order to show cause.

During the pendency of A-4782-00T3, plaintiff has filed five separate applications with this court. On May 21, 2001, we entered an order denying plaintiff's application to supplement the record, accelerate the appeal, for a stay and other relief. By order dated June 8, 2001, we denied plaintiff's application to rely upon previously-submitted appendices and other relief. On November 27, 2001, we entered three orders, denying plaintiff's applications for a date certain and for discovery; denying his motion to vacate authorization for the exchange of the child at certain locations and to accelerate the appeal; and denying his application to accept briefs and appendices in A-4782-00T3 and A-6659-00T3 for filing as submitted, that order noting that A-6659-00T3 was dismissed for failure to pay the requisite filing fee.

On appeal in A-4782-00T3, plaintiff presents the following arguments for our consideration:

> Point I
> Parentage Act and Track System Violations: Judicial and Other Misconduct.
>
> Point II
> Pre-Judgment, Bias, Maladministration:
> Judge Harper Never Entered Any Stay of the Designated

Appointees - They Just Didn't Perform - Plaintiff Didn't Stop Them.

Hagovsky Has No Excuse for Non-Compliance with the August 25 Order - - Report "Within 14 Days."

Salvaggio Canceled the Early-September Interviews, then, Did Not Arrange for the Defendant to Meet with Hagovsky to/until mid-December.

In the Interim (December 8), L o n g S e c r e t e d Conflicts/Improprieties Were Revealed.

Scucci Never Accepted the GAL Assignment, Never Performed, then, Fabricated an Excuse.

Point III
A Truck Will Run Over This Child Any Day Now.

Point IV
Kinsella Principles Apply.

On or about April 24, 2001, plaintiff filed a motion in the Family Part, returnable May 18, 2001, seeking an order awarding him custody of D; imposition of a fine, penalty or other sanction against defendant's attorney for interference with plaintiff's parenting time; vacating of the February 6, 2001 order and letter decision, and the March 26, 2001 order; directing effective parenting time for plaintiff; reducing his child support obligation; requiring defendant to list plaintiff as D's father on the child's birth certificate and provide plaintiff with D's medical and school records; and assessing counsel fees against defendant. Plaintiff's motion was adjourned by the court to May 25, 2001, for a ruling on the papers submitted.

On May 17, 2001, defendant filed a cross-motion, seeking an order amending the parenting-time schedule; confirming that plaintiff is the natural father to allow his name to be placed on D's birth certificate; and assessing counsel fees against plaintiff.

The motions were considered by the court and an order entered on June 28, 2001 that provided, in summary, as follows:

> 1. Having acknowledged paternity, the court finds plaintiff is the child's natural father and the parties shall cooperate to amend D's birth certificate.
>
> 2. Plaintiff's requests for custody, for imposition of a fine or sanction against defendant's attorney, for an order vacating the prior orders of the court are all denied based upon the prior findings made by the court.

3. Plaintiff's request to vacate the March 26, 2001 order is denied.

4. Defendant is to forward the child's subsequent school records to plaintiff within fourteen days.

5. Defendant is to acquire D's medical records and forward a copy thereof, at plaintiff's costs, to plaintiff within thirty days.

6. Plaintiff's request for compensatory parenting time is denied because the parenting time did not occur as scheduled because of the parties' lack of communication with each other. As such, the court directs that the parties attend joint counseling to improve their communication skills and to better appreciate the best interests of D. Plaintiff is to choose the counselor and notify defendant of the counselor's name and address so that the appropriate appointments can be arranged.

7. Plaintiff's parenting time schedule is modified, as follows:

a) Because plaintiff has chosen not to exercise any of the allotted parenting time with D in New Jersey, plaintiff's parenting time with D in New Jersey on alternate Saturdays is suspended; however, if he reconsiders, plaintiff may contact defendant and arrange for such parenting-time sessions to resume as can be accommodated based upon the child's schedule;

b) Plaintiff's parenting-time sessions with D shall be on alternate Sundays in Brooklyn;

c) During parenting-time sessions, defendant shall either take D to New York City by train or will bring him to plaintiff's house by car. If D is transported by train, they will arrive by 9:42 a.m. and plaintiff can pick-up D in the New Jersey Transit Waiting Room, and plaintiff shall bring D back to that location by not later than 7:15 p.m. to allow defendant and D to take the 7:40 p.m. train back home. When defendant takes D to plaintiff's home in Brooklyn, she will arrive there at 10:00 a.m. and will pick-up D from plaintiff's home at 7:00 p.m. Pick-up and drop-off shall be curbside;

d) The previously-established forty-eight hour prior notice requirement for communication between the parties on any changes in the established schedule shall continue;

e) Any make-up parenting time shall be accomplished on the succeeding Sunday that the parenting-time session was missed or canceled.

8. Plaintiff shall provide defendant with an emergency telephone number where he can be directly reached on parenting-time days, which number defendant shall use only if necessary.

9. Defendant's request for an increase in child support is granted. Effective June 28, 2001,

plaintiff's weekly child-support obligation shall be $105.00, payable directly to defendant.

10. All other requests for relief not addressed in this order are denied.

The judge attached a statement of findings of fact and conclusions of law to the June 28, 2001 order stating, in pertinent part:

1. Plaintiff's request for defendant's default on this motion is denied. Attached hereto are copies of letters of correspondence from defendant's counsel's . . . office to my law clerk dated May 9, 2001 and May 10, 2001, respectively. While plaintiff may have chosen May 18, 2001, as the return day of his original motion, May 18, 2001, could not be accommodated by the Court. In fact, the notices sent to the parties advising them of the date the motion would be heard are dated May 9, 2001. As such, defendant's counsel was not on notice of the date the motion would be heard on May 18, 2001, as neither party had received confirmation from the Court as to when the motion would be heard. Consequently, when defendant's counsel contacted this Court's chambers on May 9, 2001, he was advised that the return date of the motion for May 18, 2001, could not be accommodated, and a notice would issue in the mail for the return date of the motion. Therefore, defendant's cross-motions and certifications, filed May 17, 2001, were timely

filed in accordance with R. 1:6-3(a), eight (8) days before the motion was scheduled to be heard on May 25, 2001. The Court notes, however, that plaintiff's reply certification, although dated May 23, 2001, [was] not subsequently filed until June 1, 2001. Plaintiff's reply is therefore in violation of R. 1:6-3(a) inasmuch as it was filed eleven (11) days subsequent to the due date of May 21, 2001, four (4) days prior to the return date of the motion. As such, plaintiff's reply was not timely filed. In any event, this Court notes that all submissions of the parties have been considered when rendering this decision, regardless of the date of filing of the submission.

2. In order to expeditiously accomplish the placing of plaintiff's name on the minor child's birth certificate, this Court has found plaintiff to be the child's natural father.

3. It is clear to this Court that plaintiff has no intention of exercising the alternating Saturday visitation with the minor child in Chester, N.J., afforded to him by the February 6, 2001, Order and letter decision. As such, in order to alleviate inconveniences to the parties and the child, plaintiff's alternating Saturday visitation in Chester, N.J., is suspended pending further order of the Court. Of course, if the parties are able to come to some agreement as to visitation in Chester, NJ, then they are free to do so.

4. As the minor child is of the age when he is becoming involved in activities outside of school, there has come to be a conflict with a Saturday visitation schedule. Accordingly, visitation for plaintiff with the minor child shall be alternating Sundays, in Brooklyn, with the exchange at either Penn Station (if the defendant and the child take the train into New York City), or curbside at plaintiff's Brooklyn residence.

5. As time goes on, it seems as though the communication between the parties in this case worsens. Such conflict and inability to effectively communicate is clearly not in the best interest of the minor child. The parties are directed to attend joint counseling sessions in order to improve their communication skills with each other. Their son is quite young, and as such, the parties will be crossing paths countless times over the next decade as well as upon his adulthood. It is in the best interests of the child that the parties get along, or at least learn to communicate effectively. The present situation leads this Court to believe that without professional guidance, these parties will not learn to communicate effectively with each other for the child's benefit. Accordingly, the parties are directed to attend joint counseling sessions to improve their communication skills and to better appreciate the best interests of their son.

6. Thus far, defendant has paid all transportation costs for plaintiff's visitation

> with the minor child. Accordingly, this Court finds that it is only fair that plaintiff contribute to such costs in the form of an additional fifteen dollars ($15.00) which shall be added on to plaintiff's current weekly support obligation of ninety dollars ($90.00).

On July 5, 2001, the Supreme Court denied plaintiff's motions to expand the record and for leave to appeal.[2]

On August 2, 2001, plaintiff filed a notice of appeal from the trial court's order entered on June 28, 2001 "and all other Orders, Findings/Conclusions and the Letter Decision entered in this case including all entries made/dated February 6, 2001 and March 26, 2001." That notice of appeal was docketed as A-6659-00T3.

On August 27, 2001, we entered an order in A-6659-00T3, denying plaintiff's application to accelerate the appeal, to consolidate A-4782-00T3 and A-6659-00T3, and to waive costs on A-6659-00. On November 27, 2001, this court entered an order dismissing plaintiff's appeal docketed as A-6659-00T3 for failure to pay the requisite filing fee. On January 14, 2002, we entered an order, denying plaintiff's application to vacate the November 27, 2001 order of dismissal, noting that although plaintiff paid the $300 deposit for costs, he had not yet paid the $175 filing fee. We directed that if said amount was paid by January 31, 2002, the Clerk shall reinstate the appeal. Plaintiff's application to

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[2] Although the record on appeal is not clear, plaintiff apparently sought leave to appeal from the Supreme Court from one of the orders, referenced infra, entered by this court in A-4782-00T3, and this order of the Supreme Court relates thereto.

accelerate the appeal was also denied. Plaintiff submitted the required filing fee and his appeal was reinstated.

On appeal in A-6659-00T3, plaintiff advances essentially the same arguments set forth in his brief submitted in A-4782-00T3, with the addition of the following argument:

> POINT V
> All remedies Sought Upon Plaintiff Pro Se's Motion for Enforcement of Litigant's Rights Were Meritorious and Should Have Been Granted.

No brief has been filed by or on behalf of defendant in either appeal.

At argument, plaintiff informed this court that subsequent to the June 28, 2001 order, additional proceedings have been conducted in the Family Part pertaining to an application by defendant for permission to enroll D in the American Boychoir School located in Princeton, and that there was a pending appeal concerning an order entered in the Family Part on August 30, 2002 regarding various issues.

Upon contacting the Clerk's Office, we have determined that another appeal is presently pending in this court, docketed as A-289-02T3, from an order entered in the Family Part on August 30, 2002 by Judge David B. Rand. That order prohibited the enrollment of D in the American Boychoir School; directed that D be enrolled in the Chester school system for the 2002-2003 school year; provided for the parties to share joint legal custody of D; required D to receive immediate therapeutic counseling at the parties' shared cost;

and re-instated plaintiff's parenting time with D with the Chester library as the pick-up and drop-off point.

On September 10, 2002, an order was entered in this court, granting defendant's motion for leave to appeal from the August 30, 2002 order, and entering a stay of the August 30, 2002 order, pending appeal. That order stated it was this court's intent to permit defendant to enroll D in the American Boychoir School as a day student for the 2002-2003 school term.

After carefully reviewing the record in the light of the arguments advanced by plaintiff in A-4782-00T3 and A-6659-00T3, we affirm the orders entered in Family Part on February 6, 2001, March 26, 2001 and June 28, 2001, substantially for the reasons articulated by Judge Harper in his comprehensive written opinions accompanying each order. We add the following.

Plaintiff's contentions that the Family Part violated the New Jersey Parentage Act, N.J.S.A. 9:17-38 to -59 by failing to keep the proceedings confidential, violated R. 5:1-4, by failing to make a track assignment, and violated the principles of law articulated in Kinsella v. Kinsella, 150 N.J. 276 (1997), are without sufficient merit to warrant extensive discussion. R. 2:11-3(e)(1)(E).

There was never any dispute concerning plaintiff's parentage; both parties recognized and acknowledged that plaintiff is D's biological father. Accordingly, these were not proceedings to be conducted under the Parentage Act to determine the parent-child relationship. See R. 5:14-1 to -3. This is a non-dissolution proceeding primarily concerning the issues of custody and parenting-time. In connection therewith, for purposes of obtaining an amended birth

certificate to add plaintiff's name as D's father, a stipulated acknowledgment of that agreed-upon fact was contained in both the July 28, 2000 and June 28, 2001 orders.

We find no violation of the differentiated case management system set forth in R. 5:1-4. The Family Part immediately recognized this matter as a "high conflict" custody and parenting-time case. At the initial hearing held on July 28, 2000, the court, inter alia, ordered a best interest investigation, granted discovery, and scheduled an interview of D. After conducting the interview, and in the face of additional applications and competing allegations, the court properly appointed a psychologist and a guardian ad litem by an order entered on August 25, 2000. Both parties were ordered to meet with the appointed psychologist and to cooperate in any therapy to be provided to D.

Instead of cooperation, the court was besieged with applications by plaintiff, and no efforts were made by plaintiff to meet with either the appointed psychologist or guardian ad litem. Those repeated applications, and the failure to meet with the psychologist and guardian ad litem prevented the court from obtaining sufficient information to focus on the specific nature of the custodial and parenting-time arrangement between the parties concerning D. One of the issues of immediate concern was whether plaintiff should be afforded overnight parenting-time sessions with D. Plaintiff failed to take the initiative by immediately meeting with both Hagovsky and the guardian ad litem. Plaintiff was also given the opportunity by the October 27, 2000 order to retain his own expert to review the matter. If the orders had been complied with, the trial court would have received reports and would have been able to conduct an expeditious hearing to address the overnight parenting-time question and other pressing issues. That never occurred, ostensibly because

plaintiff directed his focus toward seeking the disqualification of Lofas, Scucci, Judge Harper, defendant's attorney, and Hagovsky. Judge Harper has adequately addressed all of those issues in the numerous applications and decisions discussed supra.

The issues presented in Kinsella, supra, 150 N.J. at 285, were whether the psychologist-patient privilege may be invoked to prevent discovery of psychotherapeutic treatment records in the context of a marital tort claim against the patient, an extreme cruelty claim for divorce by the patient, and a child custody dispute between the patient and his spouse. Here, the Lofas letter dated August 24, 2000, addressed to defendant's attorney, reported the results of a single therapy session with D on August 23, 2000, recommending that D not be forced to sleep overnight at plaintiff's home "until he feels more comfortable about staying overnight[,]" and noting that although "D and his father have a good relationship[,] I do not believe that relationship should be jeopardized by moving faster than the boy can mentally absorb." The psychotherapist-patient privilege discussed in Kinsella, N.J.R.E. 505, protects the confidentiality of communications between the "patient" and the "psychotherapist." 105 N.J. at 294-304. In Kinsella, the issue was whether therapy records of the father should be disclosed in discovery for consideration, inter alia, in the custody and parenting-time dispute on the issue of parental fitness. Id. at 291.

Here, we are dealing with the child's therapy records. The therapist merely expressed a cautious approach to continued overnight parenting time. There was no request for the discovery of any records of any prior therapy sessions conducted by Lofas in which either plaintiff or defendant participated, that would have to be subjected to the scrutiny

and procedures outlined by the Court if the piercing of the privilege is sought. Id. at 328. We certainly recognize the conflict issue properly raised by plaintiff based upon Lofas' prior involvement with all family members. Certainly, Lofas could not serve the dual role as a therapist of the child and a court-appointed evaluator. See R. 5:3-3(a) (prohibiting appointment of a mental health expert who is providing or has provided therapy to any member of that family). However, here, the court did not appoint Lofas to conduct an evaluation; the court appointed Dr. Hagovsky to fulfill that role.

Procedurally, the case was relatively simple. Because of the "high conflict" issues, the judge correctly appointed a guardian ad litem and a psychologist to both facilitate the parenting-time sessions and communication issues, and to assist the court in determining the appropriateness of overnight parenting-time sessions and in formulating a custodial and parenting-time plan that best suited the interests of the child.

In a contested custody and parenting-time case, "the primary and overarching consideration is the best interest of the child." Kinsella, supra, 150 N.J. at 317 (citing Fantony v. Fantony, 21 N.J. 525, 536 (1956)). N.J.S.A. 9:2-4c provides an expansive array of factors that must be considered when adjudicating a custodial arrangement. Terry v. Terry, 270 N.J. Super. 105, 119 (App. Div. 1994).

Prior to plaintiff filing his complaint in the Family Part on June 22, 2000, and subsequent to the parties separation and defendant's relocation from New York to New Jersey in 1996, the physical custody of D remained with defendant. Accordingly, in seeking modification of that status quo ante, plaintiff bore the burden of proof to demonstrate that, due to a substantial change in

circumstances, the best interests of the child would be served by a transfer in custody. See Chen v. Heller, 334 N.J. Super. 361, 380 (App. Div. 2000); Todd v. Sheridan, 268 N.J. Super. 387, 398 (App. Div. 1993).

The case management efforts undertaken by Judge Harper were designed to provide the court with sufficient information to evaluate plaintiff's claim for custody, and to determine a custodial and parenting-time arrangement that met the best interest of D. Plaintiff's efforts frustrated that effort and resulted in the court's dismissal of plaintiff's claims.

Our concern relates to the language contained in the February 2, 2001 order, dismissing plaintiff's complaint for custody and parenting time as a sanction for plaintiff's litigious conduct and lack of cooperation with court orders. Because the trial court continued to deal with custody and parenting-time issues, we interpret this action as a dismissal of plaintiff's claim for custody, as opposed to a dismissal of the case itself.

The issue of the nature and scope of plaintiff's participation in D's life as a father, memorialized in a meaningful parenting plan, still remains the subject of the court's inquiry in its parens patriae capacity to determine and safeguard the best interests of D. In the past, plaintiff has had overnight parenting-time sessions with D. Indeed, it may very well be that overnight parenting-time sessions with his father are in D's best interests. In absence of agreement between the parties, it is the obligation of the court to make that determination. From our review of the notice of appeal and notice of cross-appeal filed in A-289-01T3 it is evident that, notwithstanding the "dismissal" of plaintiff's complaint, subsequent to the June 29, 2001 order, there have been

numerous applications to the Family Part concerning custodial and parenting-time issues involving D.

Accordingly, we affirm the orders of the Family Part that are the subject of these appeals, and remand the matter to the Family Part on the issue of whether overnight parenting-time sessions between D and his father are in D's best interest and, if so, the nature and frequency of same. We do not view the stay granted in the September 10, 2002 order entered in A-289-02T3 as preventing the Family Part from determining an appropriate parenting plan for D with his father. We leave the case management of that issue including, but not limited to, whether appointment of a guardian ad litem and/or mental health professional, are necessary to reach those determinations, to the discretion of the Family Part. We hasten to add, however, that the overnight parenting-time issue should be expeditiously managed and adjudicated through imposition of tight time frames. Although full cooperation by both parties obviously serves the interest of their own respective positions, evaluations necessary to determine this issue can be accomplished with or without parental cooperation.

Finally, we echo the observations made by our colleague Judge Kestin a decade ago in Tahan v. Duquette, 259 N.J. Super. 328, 336 (App. Div. 1992), which are applicable here and bear repeating:

> We urge the parties to understand that courts in any jurisdiction are poor places to resolve such fundamental relational problems as child custody. Rules of law and procedural strictures are no substitute for personal choice in so intensely personal an issue. Parents who have divorced are frequently unable to

> communicate constructively on issues of importance; so they look to the legal system to resolve their problems. But no stranger in a judicial robe, however able and well motivated he or she may be, is equipped to make a decision as valid as the parents working together might make.
>
> Both [parties] must come to understand that security, peace of mind and stability are every child's right. Their inability to deal constructively with each other deprives their child of his due, which is within their power to give. Professed love is no substitute where it results in turmoil and uncertainty for the child who is pulled in opposite directions by his parents. This child will receive what he desperately needs in this regard only if both parents are genuinely prepared to subordinate their individual needs to the best interests of the child and begin to communicate with each other solely for the benefit of the child. We urge the parties to make an effort to resolve this matter between themselves with professional assistance. Otherwise, there is a substantial risk that they will doom their child to a future of conflict, sadness and certain psychological harm.

Affirmed and remanded for further proceedings consistent with this opinion.